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From: Coolbrith, Elizabeth (CAT) on behalf of CityAttorney
Sent: Monday, April 22, 2019 2:32 PM
To: 'For Cal PRA'
Subject: RE: Sunshine Ordinance Legal Opinion Request – RFLA-2019041701-SF
Attachments: Providing-Electronic-Records-in-PDF-Rather-than-Word-Format-When-Responding-to-a-Public-Records-Request.pdf; Good-Government-Guide-February-2019.pdf

Hello,

Please see attached records responsive to your request. The responsive portion of the Good Government Guide is on pages 101-102.

If you have further questions or need anything additional, please feel free to reach out to us at the below contact information.



Please send replies to cityattorney@sfcityatty.org

Sincerely,

Elizabeth A. Coolbrith

Paralegal

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From: For Cal PRA <forcalpra@gmail.com>

Sent: Wednesday, April 17, 2019 12:56 AM

To: CityAttorney <cityattorney@SFCITYATTY.ORG>

Subject: Sunshine Ordinance Legal Opinion Request – RFLA-2019041701-SF

Please see the attached letter. An email acknowledgement would be appreciated.



DENNIS J. HERRERA
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MEMORANDUM

TO: Honorable Members
Sunshine Ordinance Task Force

FROM: Paul Zarefsky
Deputy City Attorney

DATE: September 19, 2006

RE: Providing Electronic Records In PDF Rather Than Word Format When Responding
To A Public Records Request

This Office has orally advised City departments that, in response to a public records request for an electronic copy of a record, a City department may provide the record to the requester in PDF¹ rather than Word format. In this memorandum, we address the legal principles supporting this conclusion. The issue potentially affects all City departments, because all departments maintain electronic records. The volume of such records is huge, and we expect that the issue will arise in future public records requests for electronic records.

We address this issue from two perspectives – (1) protecting "metadata" hidden in the electronic record and (2) protecting the text of the electronic record. This memorandum does not address any complaint before the Task Force. Rather, we intend to provide general advice on this issue.

Protecting Metadata Hidden In The Electronic Record

A Word document – unlike an electronic record in PDF format – contains "metadata." This term generally refers to information about an electronic record that does not appear in the text but is automatically generated by the program when a text is created, viewed, copied, edited, printed, stored, or transmitted using a computer. The metadata are typically embedded in the record in a manner not readily viewed or understood by persons without specialized computer training, that enables one to locate information that is not shown in the text. We use the term "metadata" broadly to include any information embedded in the record that is not visible in the text.

The metadata may include a wide variety of information that the City has a right – and, in some cases, a legal duty – to withhold from public view. For example, earlier versions of an electronic record are present in metadata and often will include recommendations of the author of a draft, which the Sunshine Ordinance allows the City to withhold from disclosure. (S.F.

¹ The term "PDF" is an abbreviation for Portable Document Format. As the term suggests, a PDF record functions as a "portable" document in that it may be transmitted electronically as a whole document and viewed and read on a computer screen. A scanned PDF record essentially is a picture of a document that may be viewed and read on a computer screen. A searchable PDF record permits the viewer/reader to search the document for specific words or phrases and to cut and paste from the document. Neither type of PDF record contains metadata embedded in the record.

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force
DATE: November 2, 2006
PAGE: 2
RE: Providing Electronic Records In PDF Rather Than Word Format When Responding
To A Public Records Request

Admin. Code §67.24(a)(1).) Such passages could include edits that are part of the author's thought process and were never intended to be communicated to another person. As a second example, earlier versions of an electronic record that are present in metadata may include information the disclosure of which would violate a third party's privacy – a right the law zealously safeguards. (Cal. Gov. Code §§ 6250, 6254(c); S.F. Admin. Code §67.1(g); Cal. Const., Art. I, sec. 1.) A wide range of types of information may be encompassed within the right of privacy; everything from residential phone numbers and Social Security numbers to sensitive medical, financial, and sexual data to information provided by, and the identity of, whistleblowers. As a third example, metadata may include communications between attorney and client that do not appear in the text of the record. The law protects confidential attorney-client communications from disclosure. (Cal. Evid. Code §954.) These examples are merely illustrative of the broader point that metadata may contain information specifically subject to redaction under the Public Records Act and the Sunshine Ordinance.

If a department were to give a requester a document in Word format, the department would be required to review the metadata embedded in the document. Failure to conduct this review would risk disclosure of privileged material. Yet reviewing the metadata would be a laborious, burdensome, and problematic task – different in nature and magnitude from the process of reviewing the text to determine information that should be redacted and information that is reasonably segregable from that which should be redacted. Electronic records may be adapted from any number of earlier texts – which would themselves contain metadata – and may have been subject to numerous edits. Information recorded in the process of creating and editing the text of such a document may be unknown to the author, the sender, and/or the recipient. The investigation necessary to determine whether redactions in metadata are legally warranted would in many cases be daunting. Merely identifying and interpreting certain of the metadata would require considerable expertise beyond the skill and capacity of all but a small number of City employees. And there is considerable risk that even those with the expertise would not locate all the metadata.

In addition, the metadata embedded in a Word document could reveal sensitive information about the operation of the City's computer and communications system that could be used by a third party to undermine the integrity and security of that system. For example, the disclosure of such information as unique identifiers for individual computer terminals and computer servers, and the location of information in a department's computer system, could compromise the integrity and security of the system. We do not understand that disclosure of metadata alone would in itself permit an unscrupulous individual to "hack" into the City's computer system. But should such an individual find his or her way into the City's system, knowledge about metadata gleaned from a Word document made available to the public could make it easier for that person to navigate his or her way through the system, locate sensitive files, alter or delete documents, and generally undermine the security of records within the system.

In making decisions about disclosure of public records, the City may not inquire as to a requester's purpose, or the use the requester may make of the information obtained. (Cal Gov. Code §6257.5; S.F. Admin. Code §67.25(c).) Requests from prudent, civic-minded persons must be treated the same as requests from reckless or ill-motivated persons. Further, disclosure of a record to one member of the public generally precludes the City from withholding that record from another member of the public. (Cal. Gov. Code §6254.5.) Thus, even if the City is certain that a particular requester has a legitimate purpose and would not misuse – or even review –

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force
DATE: November 2, 2006
PAGE: 3
RE: Providing Electronic Records In PDF Rather Than Word Format When Responding
To A Public Records Request

information contained in the metadata of a requested record, the City does not have the luxury of indulging benign assumptions about requesters when determining its response to a public records request for an electronic record in Word format.

These problems must be understood not from the vantage point of one isolated electronic record that may be the subject of a Task Force hearing. City government is comprised of scores of departments and even more boards, commissions, and advisory bodies, and there are literally millions of electronic records within the City's files, that have been created, edited, transmitted, or received by a workforce of approximately 25,000 to 30,000 employees. The staff resources of the City – technical, professional, and clerical – that may be devoted to responding to public records requests are limited.

If the City is required to disclose documents in Word format in response to a public records request, there could be a significant adverse impact on the conduct of City business – both everyday public business, and the business of responding to public records requests. The City has no control over the number and scope of public records requests it receives, or the number and scope of requests filed by a single person or small group of persons. The added burden of having to review metadata in electronic records could be crippling if the City is required to provide electronic records to requesters in Word rather than PDF format.

The City's duty to respond to a public records request is limited by a rule of reason. It has long been understood that public records laws do not impose absolute requirements on public entities. Rather, the efforts required to respond to a public records request are inherently bounded by a standard of reasonableness. In *Bruce v. Gregory* (1967) 65 Cal.2d 666, the California Supreme Court articulated this elementary principle of public records law:

We ... hold that the rights created by [predecessor statutes to the Public Records Act] are, by their very nature, not absolute, but are subject to an implied rule of reason. Furthermore, this inherent reasonableness limitation should enable the custodian of public records to formulate regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, to prevent inspection from interfering with the orderly function of his office and its employees, and generally to avoid chaos in the record archives.

Id. at 676. Both the California courts and the California Attorney General have extended *Bruce's* implied rule of reason to public records requests under the Public Records Act. (*Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761; 64 Ops.Cal.Atty.Gen. 186, 189-91 (1981) [Op. No. 80-1106]; 64 Ops.Cal.Atty.Gen. 317, 321 (1981) [Op. No. 80-1006]; 76 Ops.Cal.Atty. Gen. 235, 241 (1993) [Op. No. 93-702].)

There is no indication that the Board of Supervisors, in adopting the Sunshine Ordinance in 1993, or the voters, in amending the Ordinance in 1999, intended to jettison this longstanding principle of public records law. Indeed, in the context of assessing under both the Public Records Act and the Sunshine Ordinance the reasonableness of a search for records, the San Francisco Superior Court has ruled that the same reasonableness limitations applicable to the Act apply as well to the Ordinance.²

² *Western Select Securities, Inc. v. Murphy, et al.*, S.F. Superior Court No. 312310, Slip Op. at 5-6 (copy attached; stamped August 24, 2000, issued December 1, 2000). This ruling was

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force
DATE: November 2, 2006
PAGE: 4
RE: Providing Electronic Records In PDF Rather Than Word Format When Responding
To A Public Records Request

In addition, Section 67.21-1(a) of the Sunshine Ordinance states that "[I]t is the policy of the City and County of San Francisco to utilize computer technology *in order to reduce the costs of public records management, including the costs of collecting, maintaining, and disclosing* records subject to disclosure to members of the public under this section." (S.F. Admin. Code §67.21-1(a) [emphasis added].)³

A court would likely conclude that these principles of reasonableness and cost containment that govern disclosure of public records under the Public Records Act and the Sunshine Ordinance permit the City to decline to provide to a requester metadata that is embedded in an electronic record such as a Word document. To require departments to disclose electronic records in Word format would necessitate their exhaustively searching and reviewing metadata in those records before finalizing a response to the requester. This process would entail considerable cost to the City, given the technical expertise and staff resources that would have to be devoted to it. Imposing this process on the City would contradict the City's own policy of using computer technology to reduce the costs incurred in disclosing public records.

Protecting The Text Of The Electronic Record

The text of a Word document may be easily edited or otherwise altered by the requester or by persons to whom the requester makes the document available. The alteration would not be obvious or readily discernible to the average person or even in many cases to someone generally familiar with the document. As a result, providing a record in Word format to a requester jeopardizes the integrity of the record. That format makes it easy for the requester or others to change the record and then present the altered record as the original. Apart from any such questionable purpose, if the City provides a record in Word format and the requester or others edit or otherwise alter the record, there is the potential for creating confusion, even inadvertently, as to whether the original record or the altered version is the true public record.

The Public Records Act allows public entities to address these concerns in making records available to the public. Section 6253.9 of the Act addresses information in an electronic format. (Cal. Gov. Code §6253.9.) Subsection (f) states: "Nothing in this section shall be construed to require the public agency to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained." (Cal. Gov. Code §6253.9(f).) Disclosure of a record in Word format could jeopardize the integrity of

not disturbed on appeal. *See Western Select Securities, Inc. v. Superior Court*, Court of Appeal, First District, Case No. A093500, May 3, 2001 (order denying petition for writ of mandate). While a trial court opinion generally may not be cited as precedent in a judicial proceeding (*see* Cal. Rule of Court 977), this trial court opinion nonetheless may shed light on whether a court would be receptive to the point that the Sunshine Ordinance carries forward the principle, recognized both pre- and post-Public Records Act, that public records laws are subject to an implied or inherent rule of reason.

³ In addition, we note that the Sunshine Ordinance endorses "[I]mplementing a system that permits reproduction of electronic copies of records *in a format that is generally recognized as an industry standard format*." (S.F. Admin. Code §67.21-1(b)(2) [emphasis added].) It is our understanding that PDF versions of electronic records are generally recognized as an "industry standard format" for providing copies of electronic records.

Memorandum

TO: Honorable Members
Sunshine Ordinance Task Force
DATE: November 2, 2006
PAGE: 5
RE: Providing Electronic Records In PDF Rather Than Word Format When Responding
To A Public Records Request

the record because the text is so easily manipulated. Subsection (f) thus gives City departments discretion to choose to provide the record to a requester in other more secure formats, and nothing in the Sunshine Ordinance changes this result.

We recognize that computer-savvy experts using sophisticated technological aids are able to tamper with electronic records in some formats other than Word. But this possibility does not change the legal analysis. Subsection (f) permits a department to provide an electronic record to a member of the public in a format less susceptible to textual manipulation than the format requested. A Word document is much more susceptible to textual manipulation, as compared, for example, to a record in scanned PDF format. So long as the integrity of the record is jeopardized by making it available in Word format, Subsection (f) permits the City to provide it in another format.

Conclusion

A court would likely conclude that a City department has discretion under both the Public Records Act and the Sunshine Ordinance to provide an electronic record to a public records requester in PDF rather than Word format.⁴

* * * * *

We hope this memorandum proves useful to the Task Force in its analysis and discussion of an important issue. If there are any questions or concerns on the general issue, divorced from the particulars of any specific case, please feel free to contact this office.

P.Z.

⁴ This memorandum does not address the power of a court in a litigation context to order or limit access of a party to another party's electronic records.

Good Government Guide

An Overview of the Laws Governing
the Conduct of Public Officials



PAGES 1-122 LAST UPDATED FEBRUARY 2019

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Dennis J. Herrera

City Attorney of San Francisco

Table of Contents

TABLE OF CONTENTS.....	III
INTRODUCTION.....	1
PART ONE: SERVING ON A BOARD OR COMMISSION	3
I. Creation of boards and commissions	3
II. Becoming a commissioner	4
A. The appointment process.....	4
B. Residency and other requirements	6
C. Oath of office.....	7
D. Term and tenure.....	7
III. Compensation and benefits	8
A. Compensation	8
B. Reimbursement of expenses	8
C. Health benefits	9
IV. Obligations of commissioners.....	9
A. Commissioners are officers of the City.....	9
B. Attendance	9
C. Conduct of commissioners	10
D. Roles of commissioners.....	10
E. Financial disclosure form.....	11
F. Annual Sunshine, ethics, and sexual harassment training	11
V. Leaving office.....	12
A. Removal.....	12
B. Recall	12
C. Resignation	13
D. Resignation by operation of law.....	13
E. Post-separation processes	13
VI. The roles of commissions, their members, and their staff	14
A. Powers, duties, and restrictions relating to commissions.....	14
1. Powers and duties	14

2.	Restrictions on commissions	15
B.	The role of and restrictions on individual commissioners	16
C.	The role of commission officers	16
D.	The role of a department head	17
E.	The role of commission secretary	18
F.	The role of the City Attorney.....	18
1.	The City is the client of the City Attorney’s Office.....	18
2.	Attorney-client privilege.....	20
3.	Respecting confidences within City government	20
4.	Consulting outside attorneys.....	21
5.	Due process screens	22
6.	The City Attorney’s role in providing ethics and open government advice	22
G.	City contracting laws	23
VII.	Operations of boards and commissions	23
A.	Governing law	23
B.	Rules and regulations	23
C.	Quorum	24
D.	Voting	25
E.	Election of officers.....	25
F.	Vacancies on boards and commissions	26
VIII.	Role of the Board of Supervisors: Charter section 2.114, the prohibition against interference in administration	26
A.	Communications between the Board of Supervisors and a department.....	27
1.	General rule	27
2.	Exception: exercising the power of inquiry	27
B.	Non-interference with administrative matters	28
1.	General rule	28
2.	Exceptions.....	28
a.	Resolutions	28
b.	Adopting the City’s budget	29
c.	Testifying at public meetings	29
d.	Adopting legislation	29
PART TWO: CONFLICTS OF INTEREST, FINANCIAL DISCLOSURE & GOVERNMENTAL ETHICS LAWS		31

I. 'Public office is a public trust'	31
A. The San Francisco Ethics Commission	31
II. Conflicts of interest and financial disclosure.....	32
A. Conflicts of interest: the Political Reform Act	32
1. Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?	34
2. Will the reasonably foreseeable financial effect be material?	35
a. Decisions involving a financial interest in a business entity	35
b. Decisions involving a financial interest in real property	36
i. Real property interests other than leasehold interests	36
ii. Leasehold interests	37
iii. Exceptions	38
c. Decisions involving a financial interest in a source of income.....	38
d. Decisions involving a financial interest in a source of gifts.....	39
e. Decisions involving a financial interest in personal finances.....	40
3. Will the material financial effect on the public official's financial interest be distinguishable from its effect on the public generally?	41
4. Is the public official making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision?	42
5. Exception: legally required participation.....	43
B. Financial disclosure under the Political Reform Act.....	43
1. Who is required to file Statements of Economic Interests?	43
2. What must be disclosed on Statements of Economic Interests?	44
3. When must Statements of Economic Interests be filed?	44
4. Where are Statements of Economic Interests filed?.....	44
5. What are the consequences of not filing the Statement of Economic Interests or not disclosing required information?	45
6. May officials amend their Statements of Economic Interests?	45
7. Who has access to Statements of Economic Interests?	45
8. Sunshine affidavit required for officials who file SEIs with the Ethics Commission	45
C. Conflicts of interest under the Political Reform Act based on solicitation and receipt of campaign contributions by department heads and members of appointed boards and commissions.....	46
1. Who is covered?	46
2. What does section 84308 prohibit?	46
a. Ban on soliciting contributions greater than \$250	46
b. Disqualification	47
3. What is a proceeding?	47

4.	When is a proceeding pending before an agency?	47
5.	Who is a party, participant or agent?	48
D.	Conflicts of interest under Government Code section 1090.....	48
1.	Who is subject to Government Code section 1090?	48
2.	What is a financial interest?	48
3.	What constitutes making a contract?.....	49
4.	Remote interests	49
5.	Noninterests	49
E.	Conflicts of interest under the common law.....	49
F.	Conflicts of interest under the Campaign and Governmental Conduct Code.....	50
1.	Bribery	50
2.	Misuse of office	50
3.	Appointments and nominations.....	50
4.	Prohibition on voting on own character or conduct	51
5.	Decisions involving family members	51
6.	Disclosure of personal, professional and business relationships	52
7.	Receipt of benefits for referrals	52
8.	Restrictions on contracting.....	52
G.	Recusal requirements for board members and commissioners with conflicts of interest	53
III.	Other prohibitions	54
A.	Prohibition on representing private parties before other city officers and employees: compensated advocacy	54
B.	Restrictions on future employment	55
1.	All officers and employees	55
a.	Permanent ban	55
b.	One-year ban on communications.....	56
c.	Waiver.....	56
d.	Future employment.....	56
i.	One year ban on employment with certain City contractors.....	56
ii.	Making decisions affecting a person with whom a City employee or official is negotiating future employment	57
2.	Future city employment for former Mayors and members of the Board of Supervisors.....	57
C.	Prohibition on incompatible activities	57
1.	Statements of incompatible activities	57
2.	Common provisions of SIAs	57
3.	Notice to officers and employees.....	58

4.	Advance written determinations.....	58
5.	Amendment of statements of incompatible activities	59
D.	Holding more than one office	59
1.	Dual office-holding for compensation	59
2.	Incompatible offices	59
E.	Prohibition on contracting with the city	60
F.	Prohibition on disclosing or using confidential information	60
G.	Restrictions on use of city resources	60
H.	Restrictions on political activity	61
1.	Use of city resources	61
2.	Soliciting campaign contributions and volunteers	61
3.	Fundraising	61
4.	Board members and commissioners running for elective office.....	62
I.	Contractor contribution ban	62
1.	Ban on contributions from contractors to elected officials or candidates.....	62
2.	Ban on solicitation and receipt of contributions from contractors	63
IV.	Restrictions on gifts, honoraria, travel & loans	63
A.	Gifts to individuals.....	64
1.	General	64
a.	Gift limits under the California Political Reform Act.....	64
b.	What is a gift?	65
c.	Exceptions.....	65
d.	Gifts that are reportable but not subject to the gift limit.....	68
e.	Disqualification	68
2.	Local gift restrictions	68
a.	Limits on gifts from a restricted source	68
b.	Gifts from subordinates	69
c.	Gifts from lobbyists.....	69
d.	Gifts for referrals	69
3.	Honoraria.....	69
a.	Generally prohibited	69
b.	Steps to take to avoid receipt	69
c.	Exceptions.....	70
4.	Travel	70
a.	The Political Reform Act	70

i.	Travel payments made directly to City officials and employees.....	70
ii.	Travel payments made in conjunction with official agency business	71
b.	Constitutional prohibition on travel discounts for officers.....	73
c.	Reporting out-of-state travel by an elected official.....	73
5.	Loans.....	73
a.	Limits on loans from agency officials, consultants and contractors	73
b.	Restriction on loan terms	74
i.	Exceptions	74
c.	Loans as gifts.....	74
i.	Loan with defined repayment date.....	74
ii.	Loan without a defined repayment date	74
iii.	Exceptions	74
B.	Gifts to the city.....	75
1.	Departments may accept gifts of up to \$10,000	75
2.	Departments must report gifts over \$100.....	75
C.	Gifts to the city that benefit particular employees or officers.....	76
D.	“Behested payment” rule.....	77
1.	Behested payment rule for elected officials.....	77
2.	Behested payment rules for all board members and commissioners.....	77
E.	Gifts distributed by the city.....	78
1.	Gifts of tickets and event passes	78
a.	Tickets or passes treated as income	78
b.	Distribution of tickets or passes for a public purpose	79
2.	Raffles.....	79
V.	Obligations of city officers and employees	80
A.	Cooperating and assisting in enforcement investigations	80
B.	Prohibition on filing false charges	80
C.	Prohibition on aiding and abetting.....	80
VI.	Protection of whistleblowers.....	80
A.	All persons may file a complaint	80
B.	City officers and employees protected against retaliation	81
VII.	Mass mailings at public expense	81
A.	What mass mailings are prohibited?.....	81
1.	Transmission.....	81

2.	Reference to elected officer	82
3.	Paid for with public funds.....	82
4.	More than 200 pieces sent	82
VIII.	Penalties for violations of ethics laws	84
A.	The Political Reform Act	84
B.	Government Code section 1090.....	84
C.	San Francisco ethics laws	84
	PART THREE: PUBLIC RECORDS & MEETINGS LAWS.....	85
I.	Introduction	85
II.	Legal overview.....	86
A.	Open government laws	86
B.	State-local overlap of open government laws	87
C.	State constitutional protection for open government.....	87
III.	Public records laws	88
A.	Definition of a public record.....	88
1.	A “writing”	88
2.	Containing “information relating to the conduct of the public’s business”	89
3.	“Prepared, owned, used, or retained”	89
4.	“By a state or local agency”	89
5.	Exceptions to the definition	90
B.	The public records request.....	90
1.	Form of request.....	90
2.	Records sought must be “identifiable”.....	90
3.	No “standing” records requests	91
4.	Questions are not records requests	91
5.	No special terminology required	91
6.	No justification required.....	92
7.	Anonymous requests permitted.....	92
8.	Requests for records permitted.....	92
9.	Types of access to records.....	92
C.	Responding to a public records request.....	92
1.	Providing assistance to requesters.....	92
2.	Providing a description of records.....	93

3.	Timely response.....	93
a.	Standard requests: 10 calendar days.....	94
i.	Time for response	94
ii.	Extension of time for response	94
b.	Immediate disclosure requests: next business day	95
i.	Requirements for an immediate disclosure request	95
ii.	Time for response	95
iii.	Extension of time for response	95
c.	Description requests: 7 calendar days	96
d.	Calculating time	96
i.	Date of receipt of request.....	96
ii.	Deadline for response.....	96
iii.	Deadline for response following extension of time	97
e.	Duty to produce records incrementally.....	97
f.	The rule of reason.....	97
4.	Proper response	98
a.	The duty to respond	98
b.	The duty to search for records.....	98
i.	A “reasonableness” standard.....	98
ii.	A duty to search all media.....	99
iii.	The duty to search emails	99
c.	Types of responses	100
d.	No privilege log required	100
e.	No duty to create record	100
f.	Information in electronic form	100
i.	General overview	100
ii.	Portable Document Format, or PDF.....	101
iii.	Metadata.....	101
iv.	Information on personal communications devices.....	102
5.	Fees.....	103
a.	No fees for records search.....	103
b.	No fees for redacting exempt information	103
c.	No fees for inspecting records.....	103
d.	Fees for copies	103
e.	Special fees for copies and other services	104

f.	Fees for electronic records	104
D.	Exemptions from disclosure	105
1.	Exemption under state or federal law	106
2.	Privacy	106
a.	Privacy interests of city employees and officials	107
b.	Privacy interests of members of the public	108
3.	Pending litigation.....	109
4.	Attorney-client communication	110
5.	Attorney work product.....	110
6.	Informants, complainants, witnesses, and whistleblowers.....	110
7.	Trade secrets	111
8.	Investigative and security records.....	112
9.	Other exemptions.....	113
E.	Contracts and related records.....	114
1.	General rules	114
a.	Mandatory post-award disclosure.....	114
b.	Notice of disclosure requirements	114
c.	Financial data.....	115
d.	Records relating to negotiation strategy	115
e.	Score sheets and other evaluation materials for proposals	115
f.	Draft contracts.....	115
g.	Other exemptions.....	116
2.	Sole source service contracts, certain leases and permits, and franchise agreements	116
F.	Enhanced access to public records under the Sunshine Ordinance.....	116
1.	General balancing.....	117
2.	Deliberative process privilege	117
3.	Investigative records exemption	117
4.	Budget and financial records.....	117
5.	Confidential litigation settlements prohibited	118
G.	Additional public information requirements.....	118
1.	Oral public information	118
2.	Public review file.....	118
3.	Annual reports.....	119
4.	Annual lists of sole source contracts	119
5.	Calendars for the Mayor, department heads, and members of the Board of Supervisors	119

6.	Maintaining a website	121
IV.	Records retention and destruction laws	122
A.	Definition of ‘records’ that must be retained	122
B.	Classification of records that must be retained	123
C.	The records retention schedule	123
D.	Other principles pertaining to retention of records.....	124
1.	Retention following a public records request	124
2.	Retention in light of litigation risk	124
3.	Method of retaining electronic records	125
E.	Sunshine Ordinance provisions	125
1.	The general duty to maintain and preserve records	125
2.	Designation of certain officials’ records as city property that remains with the city.....	125
3.	Duty to cooperate with City Administrator in compiling city index	125
4.	Specific retention requirements.....	126
V.	Public meeting laws.....	126
A.	Entities subject to public meeting laws.....	126
1.	Legislative or policy bodies.....	126
2.	Passive meeting bodies	127
3.	Private entities.....	127
4.	Individuals.....	128
5.	Officials who have not assumed office.....	128
6.	‘Meeting’ defined	128
7.	The concept of a ‘meeting’	128
8.	Examples of meetings.....	129
a.	Retreats.....	129
b.	Site visits	129
c.	Meal gatherings	129
9.	Non-meetings	130
a.	Individual contacts between ‘another person’ and a majority of members	130
b.	Attendance at social, ceremonial, or recreational gatherings.....	131
c.	Attendance at conferences.....	131
d.	Attendance at local community meetings.....	132
e.	Attendance at meetings of a standing committee of the policy body	132
f.	Attendance at meetings of another policy body	132
10.	Unlawful meetings.....	132

a.	Seriatim meetings	133
b.	'Pre-meetings' and 'post-meetings'	134
B.	Time, place, and notice requirements for meetings	134
1.	Types of meetings.....	134
2.	Time and place of meetings.....	134
a.	Regular meetings	134
b.	Special meetings	135
c.	Meetings held within city limits.....	135
3.	Notice of meetings: posting agendas	135
a.	Regular meetings	135
b.	Special meetings	136
c.	Meetings of policy bodies that do not have a regular meeting schedule.....	136
4.	Mailing agendas to interested persons	137
5.	Alternative format of agenda for disabled persons.....	137
6.	Cancellation of meetings	137
C.	Meeting agendas.....	137
1.	Description of agenda items.....	137
a.	The "meaningful description" standard.....	137
b.	Discrete actions	139
c.	Erroneous agenda items	139
d.	Amended agenda items	139
e.	"Discussion" and "action" items	139
2.	Materials accompanying agenda items	140
3.	Discussing or acting on items not on the agenda.....	140
4.	Mandatory notices and information on agendas	141
a.	Date/time of meeting	141
b.	Place of meeting	141
c.	Opportunity for general public comment.....	142
d.	Opportunity for public comment on agenda items	142
e.	Sunshine rights.....	142
f.	Ringling and use of cell phones	142
g.	Sensitivity to chemical-based products	143
h.	Disability accommodation	143
i.	Location of materials accompanying agenda items.....	143
j.	Location of agenda materials distributed less than 72 hours before meeting.....	143

k.	Lobbying activity	143
l.	Other information pertaining to the meeting or policy body	144
D.	Conduct of meetings	144
1.	Timing and sequencing issues	144
2.	Quorum requirements.....	145
3.	Voting requirements.....	146
4.	Meetings by teleconference	147
5.	Text messaging during meetings	147
6.	Disruption of meetings	148
7.	Adjourning or continuing meetings	149
E.	Rights of the public at meetings.....	150
1.	The right to attend meetings.....	150
2.	The right to record, film, photograph, and broadcast meetings	151
3.	The right of public comment at meetings	151
a.	Types of public comment.....	151
b.	Timing of public comment	151
c.	Time limits for speakers.....	152
d.	Public comment on consent agenda items.....	153
e.	Content of public comment.....	153
f.	Procedures relating to public comment	154
g.	The right to comment anonymously	154
h.	Responding to public comment.....	154
i.	Public comment and committees	155
j.	Public comment by members of a policy body.....	155
4.	The right to obtain materials distributed to the policy body at or before the meeting.....	156
5.	The right of disabled persons to reasonable accommodation	157
F.	Records of meetings.....	157
1.	Audio recordings.....	157
2.	Minutes.....	158
a.	Appointive boards, commissions, and other units of government in the executive branch	158
b.	Charter boards and commissions	158
c.	Other policy bodies.....	159
d.	Other issues pertaining to minutes	159
G.	Closed sessions.....	160
1.	General principles.....	160

a.	Notice and agenda requirements	160
b.	Public comment requirements	161
c.	Deciding to go into closed session	161
d.	Attendance at closed sessions	161
e.	Confidentiality of closed sessions	162
f.	Reporting on closed sessions	163
g.	Voting on disclosure of closed session discussion	163
h.	Recordings of closed sessions	163
i.	Minutes of closed sessions	164
j.	Holding multiple closed sessions in one meeting	164
2.	Common types of closed sessions	164
a.	The personnel exception	165
b.	The pending litigation exception	167
c.	The real estate negotiations exception	169
d.	The labor negotiations exception	170
e.	The security exception	170
f.	Miscellaneous exceptions	171
H.	Passive meeting bodies	171
1.	Types of passive meeting bodies	171
2.	Rules for passive meeting body gatherings	172
VI.	Remedies and penalties for violations of the Brown Act, Public Records Act, and Sunshine Ordinance....	173
A.	Violations of the Brown Act	173
1.	Criminal penalty for willful violations	173
2.	Invalidation of certain actions	173
3.	Injunctive and declaratory relief	175
4.	Sanctions for disclosing confidential closed session information	175
B.	Violations of the Public Records Act	175
C.	Remedies and penalties under the Sunshine Ordinance	176
1.	Willful violation is official misconduct	176
2.	Administrative appeal of public records denials	176
3.	Administrative appeal of open meeting violations	176
4.	Court enforcement of the ordinance	177
VII.	Other city requirements for hearings and notice.....	177
A.	Charter section 16.112: required notice and hearings for certain city actions	177
B.	The Citizens' Right-To-Know Act of 1998: pre-approval notice for certain city projects	178

1.	Scope of ordinance	178
2.	Timing of required notice	179
3.	Nature of required notice.....	179
C.	Sunshine Ordinance: notice to residents of city activities affecting their property or neighborhood.....	180
VIII.	The application of open government laws to private entities	180
A.	Disclosure of city’s receipt of outside funding	180
1.	Triggering the disclosure requirements.....	181
2.	The disclosure requirements	181
B.	Disclosure of transactional records of entities that collect fees for city functions	181
C.	Disclosure of financial records of entities receiving city subsidies	182
D.	Access to meetings and records of nonprofit entities receiving city funding	182
1.	Scope of ordinance	182
2.	Open board meetings	183
3.	Public access to financial records	183
4.	Community representation on the board	184
5.	Enforcement of the ordinance	184
E.	Application of passive meeting body rules to certain private entities.....	184
F.	Application of the Brown Act and Public Records Act to certain private entities	185
	REFERENCES.....	187
	APPENDIX.....	189
I.	Board of Supervisors resolution on attendance for members of boards and commissions	189
II.	Mayor’s policy on commissioner attendance.....	190
III.	Mayor’s policy on discriminatory or harassing remarks made at public meetings	191
	PUBLIC RECORDS REQUEST FORM.....	193

Introduction

“No man should have a political office because he wants a job. A public office is not a job. It is an opportunity to do something for the public. And once in office, it remains for him to prove that the opportunity was not wasted.”

— Franklin Knight Lane,
City Attorney of San Francisco, 1899-1900

Notwithstanding the archaic gender specificity characteristic of Franklin Knight Lane’s time, the quote above by one of my more notable predecessors elegantly captures the abiding aspirations of public service, and the principles that underscore good government.

Mindful of these values, I am pleased to offer this Good Government Guide. My office wrote and updated this guide to provide employees and officials of the City and County of San Francisco with a usable, accessible overview of the major laws governing their conduct as public servants—from public meetings and public records responsibilities to conflict-of-interest and personal financial reporting requirements. This updated publication is available on my office’s website. I encourage employees and officials to read it and refer to it often.

While I hope this publication will serve as a helpful general reference for department personnel, commissioners, commission staff members, and other public servants, it cannot anticipate every situation or question that may arise. Neither can it foresee the inevitable changes that policymakers, courts, and voters make to local, state, and federal laws. So please be prudent: understand that no publication can substitute for the careful consideration of the application of laws to specific conduct. For questions regarding a particular course of action you may pursue as a public official, I encourage you to contact the Deputy City Attorney assigned to your department or commission, in advance of taking such action. You may also contact the Office of the City Attorney directly at (415) 554-4700.

Remember: a public office is a public trust. As public officials for the City and County of San Francisco, it is our highest responsibility to conduct the functions of government in a way that is honest, open, and responsive to the citizens we serve. I am proud to offer my office’s unwavering commitment to assist in that endeavor. And I hope you find this Good Government Guide helps toward that end.

Sincerely,

A handwritten signature in blue ink, appearing to read "D.J. Herrera", is written over the printed name.

DENNIS J. HERRERA
City Attorney of San Francisco

Part One: Serving on a board or commission

In this part of the Good Government Guide, we provide general information about the role and duties of City boards and commissions and the interplay of those bodies with departments, the City Attorney's Office, the Board of Supervisors, and the Mayor. We also address laws governing appointments to boards and commissions, tenure in office, leaving office, and related topics. Specific provisions in the Charter relating to certain boards and commissions may differ from this general description. For more information on specific boards and commissions, see City Attorney Opinion No. 2014-01, available through the City Attorney's Office's website at <http://www.sfcityattorney.org/>. Also, the City Attorney's Office is available to answer questions regarding the rules governing boards and commissions.

I. Creation of boards and commissions

The Charter establishes most City boards and commissions. The Board of Supervisors has also created a few boards and commissions by ordinance. San Francisco voters, by initiative ordinance, have done likewise.

The Board of Supervisors and the voters have created many advisory committees, task forces, working groups, and other entities, by both ordinance and resolution. As described more fully in Parts Two and Three of this Guide, these advisory bodies are subject to open meeting laws, public records laws, and some ethics and conflict of interest laws. We primarily direct our discussion of boards and commissions in Part One toward Charter boards and commissions, and to a lesser extent boards and commissions created by ordinance. Part One provides less information about service on and the functioning of advisory bodies.

State and federal law have created entities legally separate from the City governed by a board or commission, such as the San Francisco Unified School District, San Francisco Community College District, San Francisco Health Authority, San Francisco Housing Authority, the Successor Agency to the San Francisco Redevelopment Agency, and Workforce Investment Board. These governmental entities are not part of the City and County of San Francisco (the "City"). But they operate entirely within the boundaries of San Francisco and in many cases have intrinsic ties to the City. For example, the Board of Supervisors functions as the governing board of some of these separate agencies, such as the Successor Agency and the Transportation Authority. These entities carry out various state and federal functions at the local level.

The City also participates in certain multi-county agencies created by State law or by agreement between public entities. These agencies include, for example, the Golden Gate Bridge Transit District, Transbay Joint Powers Authority, and Bay Conservation and Development Commission.

II. Becoming a commissioner

A. The appointment process

The Charter prescribes four main methods of appointment to boards and commissions, which we describe below. These are:

- Exclusively mayoral appointments to the board or commission, under Charter § 3.100(17).
- Other systems for exclusively mayoral appointments, not governed by Charter § 3.100(17).
- Mixed systems of appointments, divided between the Mayor and the Board of Supervisors.
- Other mixed systems of appointments, divided among other appointing authorities.

In some cases, the appointment process is complicated, and not all of the details are specified here. When considering the rules governing appointments to a particular board or commission, one should review the specific Charter or code provision(s) applicable, and consult the City Attorney's Office as appropriate.

Exclusively mayoral appointments under Charter § 3.100(17). Charter § 3.100(17) prescribes the most common method of appointment. The Mayor appoints all members of the board or commission. The appointments are effective upon transmittal of a Notice of Appointment to the Clerk of the Board of Supervisors. The Notice of Appointment must include the person's qualifications to serve and a statement as to how the individual represents the communities of interest, neighborhoods, and diverse populations of the City. The appointment remains in effect unless the Board of Supervisors rejects it by a two-thirds vote (eight members) within 30 days following the transmittal of the Notice of Appointment. For more information on the appointment process, see City Attorney Opinion No. 2003-05, available on the City Attorney's website.

Charter bodies to which this appointment process applies include (references are to Charter sections):

- Airport Commission (§ 4.115)
- Arts Commission (§ 5.103)
- Civil Service Commission (§ 10.100)
- Commission on Aging (§ 4.120)
- Commission on the Environment (§ 4.118)
- Commission on the Status of Women (§ 4.119)
- Fire Commission (§ 4.108)
- Health Commission (§ 4.110)

- Human Rights Commission (§ 4.107)
- Human Services Commission (§ 4.111)
- Juvenile Probation Commission (§ 7.102)
- Library Commission (§ 8.102)
- Recreation and Park Commission (§ 4.113)
- War Memorial Board of Trustees (§ 5.106)

Boards and commissions created by ordinance that wield executive power must be appointed under Charter § 3.100(17).

Exclusively mayoral appointments not governed by Charter § 3.100(17). This second type of appointment process is a variant of the first. Again, the Mayor makes all appointments to the board or commission, but different rules govern when and whether the appointments are effective. In some cases, appointments are not effective until the Board of Supervisors approves them. In other cases, appointments are not effective immediately but become effective after a specified number of days if the Board does not disapprove them. Charter bodies to which this second type of appointment process applies include:

- Historic Preservation Commission (§ 4.135)
- Municipal Transportation Agency (§ 8A.102)
- Port Commission (§ 4.114)
- Public Utilities Commission (§ 4.112)

Mixed system of appointments, divided between the Mayor and the Board of Supervisors. The Charter provides a third type of appointment process, where the Mayor makes some appointments to the board or commission, and the Board of Supervisors (or Board President or Rules Committee) makes the remaining appointments. There are variations among these bodies as to whether appointments not made by the Board of Supervisors are subject to the Board's review and/or depend on the Board's approval. Charter bodies to which some variation of this mixed system of appointments applies include:

- Board of Appeals (§ 4.106)
- Building Inspection Commission (§ 4.121)
- Entertainment Commission (§ 4.117)
- Planning Commission (§ 4.105)
- Police Commission (§ 4.109)
- Small Business Commission (§ 4.134)
- Youth Commission (§ 4.122)

Mixed system of appointments, divided among other appointing authorities. This fourth type of appointment process is a variant of the third. Multiple authorities, but not

limited to the Mayor and the Board of Supervisors, exercise the appointment power. Charter bodies to which some variation of this mixed system of appointments applies include:

- Elections Commission (§ 13.103.5)
- Ethics Commission (§ 15.100)
- Health Service Board (§ 12.200)
- Retirement Board (§ 12.100)
- Retiree Health Trust Fund Board (§ 12.204)

For the Elections Commission, the Mayor, Board of Education, Board of Supervisors, City Attorney, District Attorney, Public Defender, and Treasurer each appoint one member. For the Ethics Commission, the Mayor, Assessor, Board of Supervisors, City Attorney, and District Attorney each appoint one member.

The Health Service Board is comprised of two mayoral appointees, a member of the Board of Supervisors appointed by the Board President, an appointee of the Controller, and three members elected by participants in the Health Service System. The Retirement Board has three mayoral appointees, a member of the Board of Supervisors appointed by the Board President, and three members elected by participants in the Retirement System. The Retiree Health Trust Fund Board is comprised of one appointee each of the Controller, the Treasurer, and the Executive Director of the San Francisco Employees Retirement System, and two members elected by participants in the Health Service System.

Appointments to a few Charter boards and commissions do not conform to any of the four processes described above. One example is the Fine Arts Museums Board of Trustees (§ 5.105). Incumbent trustees elect new trustees. Appointments to citizen advisory panels the Charter prescribes, and appointments to the many advisory bodies created by the Board of Supervisors, often do not conform to these processes, either.

If the appointed official is required to file a Statement of Economic Interests (see Part Two, Section II.B.), the appointing authority must provide written notice to the Ethics Commission of the name of the appointee within 15 days of the appointee's assuming office. Campaign and Government Conduct Code § 3.1-105 (hereafter "C&GC Code").

B. Residency and other requirements

In general, Charter section 4.101 governs residency and other requirements for appointees to City boards and commissions. Under this provision, members of Charter-created boards and commissions must be, and remain during their tenure, "electors." Charter § 4.101(a)(2). An elector is a person registered to vote in the City. Charter Art. XVII. The voter registration requirement subsumes other requirements: that members be (1) of legal voting age, (2) residents of the City, and (3) United States citizens. In a few cases, the Charter specifies that members of a board or commission need not be electors, e.g., the Youth Commission (§ 4.123); Asian Art Commission (§ 5.102); and Fine Arts Museums Board of Trustees (§ 5.103).

For boards and commissions created by ordinance, the appointing officer or entity may waive the residency requirement if a qualified local elector cannot be located. In addition,

the ordinance may specify that members need not be residents or of legal voting age, but may not dispense with the citizenship requirement. Charter § 4.101(a)(2).

Some boards and commissions must include members who are selected from a specified profession, trade, union, or business. The Ethics Commission may grant such appointees a waiver from certain conflict of interest laws (see Part Two, Section III(B)(1)(c)). The California Political Reform Act provides limited exceptions from its conflict of interest provisions for such appointees where the legislation creating the body contains certain findings. 2 C.C.R. § 18707.4.

If a commissioner fails to meet the requirements of the office after assuming office (for example, the commissioner ceases to be an elector), the commissioner has effectively resigned by operation of law. A commissioner should notify the appointing authority immediately if any change in circumstances renders the commissioner ineligible to serve.

C. Oath of office

To exercise the powers of the office, an appointed commissioner must take the oath of office prescribed by the California Constitution. Cal. Const. Art. 20, § 3. Thus, a member of a Charter board or commission or other policy body that exercises sovereign power must be sworn in before that person may act as a member of the body. Conversely, a member of a policy body that is purely advisory does not have to take an oath of office to serve on the body. Even if an oath is not legally required in such cases, members of the body may take a ceremonial oath.

D. Term and tenure

Under the Charter and applicable ordinances, the term of office for most members of appointive boards and commissions is four years. When a new board or commission is created in the Charter, or when new members are added to an existing Charter board or commission, the members must be appointed to staggered terms. Charter § 18.114. But a new Charter provision could expressly provide otherwise.

Once a term expires, the incumbent, if not replaced, may retain the office as a holdover member until a successor takes office, unless a specific Charter provision states otherwise. But, as we explain below, the Charter severely limits this general principle. A holdover member has the same powers and duties as other members of the body.

There are two important restrictions on the ability of a person to serve as a holdover member:

- The Charter may specifically prohibit a board or commission from having any holdover members. For example, the tenure of members of the Police Commission terminates at the end of their terms. Charter § 4.109.
- The Charter may limit the holdover period to 60 days. Charter § 4.101.5(b).

The 60-day limit is especially important because it applies to a large number of Charter bodies. The general rule is that a member of an appointive board, commission, or other unit

of government of the executive branch of the City or otherwise created in the Charter, may serve as a holdover member only for 60 days after the member's term ends. Still, there are many bodies to which the 60-day limit does not apply. Charter § 4.101.5(a). It does not apply to holdover members of:

- The various arts-related boards and commissions in the Charter (the Arts Commission, Asian Art Commission, Fine Arts Museums Board of Trustees, the War Memorial and Performing Arts Center Board of Trustees).
- The Retirement Board, Retiree Health Trust Fund Board, and Health Service Board.
- Citizen advisory committees created in the Charter.
- Purely advisory bodies, in the executive branch of the City or elsewhere.

The term of an office and an individual commissioner's tenure in that office are not necessarily the same. The term of an office is generally a fixed period of time measured from a fixed anniversary date. For boards and commissions whose members have four-year terms, the term is generally measured as four years from the date a quorum of the entity was first sworn into office, unless the enabling legislation mandates a specific operative date. The term runs with the office, not with the individual occupant, and continues to run whether the seat is occupied or vacant. If, for example, a seat for an office with a four-year term is left open for six months after the term expires, the term of the office is four years, but the next commissioner – if appointed six months after the earlier term expired – would hold office only for the remaining three and one-half years of that term. The commissioner does not have a right to a full four years in office from the date of appointment.

III. Compensation and benefits

A. Compensation

The Board of Supervisors sets compensation, if any, for each City board and commission, except where other Charter provisions or controlling law specifies or bars compensation. Charter § A8.400.

B. Reimbursement of expenses

The City Controller has issued a written policy that specifies both the circumstances under which City employees and commissioners may receive reimbursement for travel and other expenses incurred when carrying out City business and the procedures for seeking reimbursement. The City Controller's reimbursement policy is available through its website, at <http://sfcontroller.org/>.

C. Health benefits

Charter sections 12.202 and A8.420 establish the City's Health Service System and provide that City officers and other officers as provided by ordinance are entitled to health care benefits. Administrative Code section 16.700 lists those entities whose members are eligible to participate in the Health Service System.

IV. Obligations of commissioners

A. Commissioners are officers of the City

Once a commissioner takes the oath of office, the commissioner becomes an officer of the City. An office is a public trust and all officers must exercise their duties in a manner consistent with this trust. Charter § 15.103. Commissioners owe a duty of loyalty to the City and must carry out their duties in a manner that serves the City's interests. (Please see Part Two for more information on the exercise of this public trust.)

In some cases, commissioners, by law, must be selected from a certain neighborhood, community or professional group. But such commissioners owe their duty of loyalty to the entire City. They do not just represent a neighborhood, community or profession, although they may bring to their service a greater knowledge of or appreciation for the needs of that group. These commissioners, like all commissioners, must act in the City's interests.

B. Attendance

The Charter does not generally set specific attendance requirements for commissioners. (An exception is Charter section 4.123, which sets attendance requirements for Youth Commissioners.) Nonetheless, attending meetings is a fundamental part of a commissioner's duties. Repeated failure of for-cause commissioners to attend meetings could constitute official misconduct, which could lead to removal from the commission. Further, failing to attend meetings over a period of time could result in a finding that a commissioner has abandoned the position, causing the removal of the commissioner. San Francisco Administrative Code § 16.89-17 (the "Admin. Code").

Boards and commissions do not have the general authority to adopt a rule about removing a member for failure to attend meetings. Ordinances or resolutions creating policy bodies sometimes contain attendance requirements and may specify that a member's failure to satisfy those requirements shall terminate the member's service on the body. In any event, a board or commission, whether created by Charter, ordinance, or resolution, may adopt a rule requiring that the body notify the appointing authority when a member misses a certain number of meetings over a specified period of time.

It is important that members of boards and commissions regularly attend meetings not only so that they may contribute to the work of the body but also to assure that a quorum is present so that meetings may be held. To address these concerns, the Mayor has issued

standards for commissioner attendance, and the Board of Supervisors has passed a resolution urging boards and commissions to adopt internal policies regarding members' attendance at meetings. Both of these documents are included in the Appendix to this Guide.

C. Conduct of commissioners

The Charter and the Municipal Code do not specifically set forth a “code of conduct” for commissioners. But as we explain throughout this Guide, many state and City ethics and sunshine laws govern the actions of commissions and their members. As noted above, commissioners must comport themselves in a manner consistent with the public trust. Under the Charter, wrongful behavior by a public officer in relation to the duties of office, including conduct that “falls below the standard of decency, good faith and right action impliedly required of all public officers” is official misconduct, which may result in removal from office. Charter § 15.105(e).

Some commissions choose to adopt codes of conduct for their members. So long as the code of conduct is consistent with state and local law, a commission is free to do so. Even without a code of conduct, commissioners are bound to act in a manner to uphold the public trust.

D. Roles of commissioners

When carrying out the functions the Charter and Municipal Codes assign to them, different boards and commissions may serve in different roles. Most act, either exclusively or primarily, as administrative or executive bodies. These bodies set policies for, approve actions of, and oversee departments. In setting policies to implement legislation, these bodies act in a “quasi-legislative” role, for example, by adopting regulations that flesh out the details of ordinances.

Some boards and commissions act, primarily or frequently, in a “quasi-judicial” role. When acting in a quasi-judicial capacity, the body adjudicates matters between private parties, or, more typically, between the City and private parties or employees. For example, granting or revoking a regulatory permit is a quasi-judicial decision, as is disciplining an employee. Boards and commissions that most frequently act in a quasi-judicial capacity include the Board of Supervisors when hearing appeals from certain land use decisions; Assessment Appeals Board; Board of Appeals; Civil Service Commission; Entertainment Commission; Ethics Commission; Fire Commission; Planning Commission; Police Commission; and Rent Board.

When acting in a quasi-judicial capacity, members of boards and commissions function like judges. Thus, they must take care to ensure that the parties appearing before them receive due process. Due process requires fair adjudicators. Commissioners must listen to the evidence presented before making decisions and base their decisions on the evidence in the record before them and on the governing law.

Frequently, bodies that act in a quasi-judicial capacity adopt rules addressing the procedures for adjudicative hearings and the conduct of commissioners regarding evidence and witnesses. Although boards and commissions have considerable leeway in how they structure their quasi-judicial hearings, commissioners should be very cautious about

engaging in “ex parte communications”—private communications with one interested party concerning the subject matter of the proceeding, whether a private party or a City department—when the other party or parties are not present. To address this concern, some boards and commissions have adopted rules that expressly prohibit ex parte communications. Even if a board or commission does not have such a rule, generally the best practice is to avoid such communications. And if the board or commission has not adopted a rule prohibiting ex parte communications, members who elect to engage in ex parte communications prior to a quasi-judicial hearing should disclose the substance of those communications on the record at the start of the public hearing.

E. Financial disclosure form

Within 30 days of assuming office, a commissioner must file a financial disclosure form with the Ethics Commission. The commissioner must then file an annual financial disclosure form on or before April 1st of each year and within 30 days of leaving office. These forms are called “Statements of Economic Interests,” and are also known as “SEIs” or “Form 700s.” The list of local appointed officials and employees who are required to file SEIs is set forth in San Francisco’s Conflict of Interest Code in Chapter 1 of Article III of the San Francisco Campaign and Governmental Conduct Code. These forms are public records available for anyone to review. (For more information on SEIs, see Part Two.)

F. Annual Sunshine, ethics, and sexual harassment training

Each commissioner must complete an annual ethics and sunshine training between January 1 and April 1. California Government Code (hereafter “Cal. Govt. Code”) § 53235; Admin. Code § 67.33; San Francisco Ethics Commission Regulations (“EC Regs.”) 67.33-1, and 15.102-1. Every commissioner must file declarations with the Ethics Commission stating that the commissioner has complied with these requirements, and the Ethics Commission makes these declarations available through its website at sfethics.org. The Ethics Commission also provides forms for this purpose at its office and on its website. The City Attorney’s Office, in cooperation with the Ethics Commission and the Sunshine Ordinance Task Force, provides online training to satisfy these requirements. In addition, self-study materials are available on the City Attorney’s website.

The City provides sexual harassment training for its employees who are supervisors as required by state law. Cal. Govt. Code § 12950.1. Even though many commissioners and board members are not City employees, most commissions and boards do have authority over at least one employee. Therefore, the City recommends (and in some cases requires) this training for commissioners and board members. Information regarding this training is available from the City Attorney’s Office.

V. Leaving office

A. Removal

Many members of boards and commissions serve “at will,” and can be removed at the pleasure of the Mayor or other appointing authority at any time and without cause. Other commissioners may be removed only “for cause.” The Charter provision establishing each board or commission should be consulted to determine whether its members are “at will” or “for cause.”

“For cause” commissioners may only be removed through the Charter’s official misconduct process, set forth in section 15.105. That provision defines official misconduct as:

[A]ny wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of interest or governmental ethics law. When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.

Charter § 15.105(e). Removal is also mandatory upon conviction of a felony involving moral turpitude. Charter § 15.105(c).

The removal process begins with the appointing authority (often but not always the Mayor) suspending the officer. Charter §§ 15.105(a), (b). The appointing authority must immediately notify the Ethics Commission and Board of Supervisors of the suspension in writing. Upon suspension of the commissioner, the appointing authority must appoint a qualified person to discharge the duties of the office during the suspension.

The appointing authority must present written charges against the officer to the Ethics Commission and Board of Supervisors at or before their next regularly scheduled meetings following the suspension. The appointing authority must also immediately furnish a copy of the charges to the officer, who has the right to appear with counsel to defend himself or herself in a hearing before the Ethics Commission.

Following the hearing, the Ethics Commission must recommend to the Board of Supervisors whether the charges should be sustained. If, after reviewing the complete record, the Board of Supervisors sustains the charges by no less than a three-fourths vote of all eleven members (i.e., nine votes), the suspended officer is removed from office. If the charges are not sustained, or not acted on by the Board of Supervisors within 30 days of receipt of the record from the Ethics Commission, the suspended officer is reinstated.

B. Recall

In a few instances, the Charter permits removal of commissioners through the recall process. The voters may recall members of the Airport Commission, Ethics Commission, Port

Commission, and Public Utilities Commission. Charter §§ 4.114, 14.103(a). A voter may not initiate a recall petition until the officer has held office for six months.

C. Resignation

Any member of a City board or commission may resign by presenting a written resignation to the Mayor or other body or officer that appointed the member. Admin. Code § 16.89-15. An oral statement of resignation is not sufficient. The resignation becomes effective at the time the appointing authority receives it, unless the written resignation provides for a later effective date. Admin. Code § 16.89-16. For example, a notice of resignation could state that the resignation will become effective on a specific date or once the appointing officer designates a new appointee. An offer of resignation, while indicating the office holder's willingness to vacate the office, does not, by itself, constitute a resignation, even if in writing.

Once a resignation is effective, neither the member nor the appointing officer may rescind it. As a general rule, the appointing officer could appoint the former commissioner to the vacancy the resignation created. But the reappointment would be subject to the normal rules governing appointments to that board or commission.

For more information on the resignation process, see City Attorney Opinion No. 2007-01, "Laws Governing Resignations of Appointed City Officers," available through the Legal Opinions section of the City Attorney's website.

D. Resignation by operation of law

As previously discussed, if a commissioner no longer meets the eligibility requirements to serve on a board or commission, the commissioner may no longer serve, regardless of whether the commissioner has formally submitted a resignation.

E. Post-separation processes

Within 15 days after a member leaves office for any reason, the appointing officer must provide written notice to the Ethics Commission of the name of the person leaving office. C&GC Code § 3.1-105. And as discussed above and in Part Two below, the commissioner or board member must file a final Statement of Economic Interests within 30 days after leaving office.

VI. The roles of commissions, their members, and their staff

A. Powers, duties, and restrictions relating to commissions

1. Powers and duties

Charter section 4.102 sets forth the powers and duties of boards and commissions in the executive branch. Section 4.102 provides that each board or commission shall:

- 1) Formulate, evaluate and approve goals, objectives, plans and programs and set policies consistent with the overall objectives of the City, as established by the Mayor and the Board of Supervisors through the adoption of legislation;
- 2) Develop and keep current an Annual Statement of Purpose outlining its areas of jurisdiction, authorities, purpose and goals, subject to review and approval by the Mayor and the Board of Supervisors;
- 3) After public hearing, approve applicable departmental budgets or any budget modifications or fund transfers requiring the approval of the Board of Supervisors, subject to the Mayor's final authority to initiate, prepare, and submit the annual proposed budget on behalf of the executive branch and the Board of Supervisors' authority under Charter section 9.103 (each department is responsible for providing the Mayor and Board of Supervisors with a mission-driven budget that describes each proposed activity of the department and the cost of the activity, under Charter § 9.114);
- 4) Recommend to the Mayor, for further submission to the Board of Supervisors, rates, fees and similar charges for items coming within the body's jurisdiction;
- 5) Unless the Charter provides a different procedure for appointing department heads, submit to the Mayor at least three nominees, and if rejected, make additional nominations in the same manner, for the position of department head, subject to appointment by the Mayor. (The three-nominee process is intended to give the Mayor a range of choices. If the Mayor does not object, the board or commission may submit fewer than three names. The Mayor may indicate a preferred nominee before the body submits its nominee(s), but the body does not have to honor the Mayor's preference. The Mayor may also decline to accept any of the body's nominees and ask for further nominations. See City Attorney Opinion No. 2014-01.);
- 6) Remove a department head; if the Mayor recommends removal of a department head to the board or commission, the body must act on the recommendation by removing or retaining the department head within 30 days; failure to act on the Mayor's recommendation is official misconduct (under Charter section 4.109, the

Mayor, acting independently of the Police Commission, may remove the Chief of Police);

- 7) Conduct investigations into any aspect of governmental operations within its jurisdiction through the power of inquiry, and make recommendations to the Mayor or the Board of Supervisors;
- 8) Exercise such other powers and duties as prescribed by the Board of Supervisors; and
- 9) Appoint an executive secretary to manage the affairs and operations of the board or commission.

To carry out its duties, a commission may hold public hearings and take testimony. Charter § 4.102(10). In addition, relative solely to the affairs under its control, a commission may examine the department's documents, hold public hearings, subpoena witnesses, and compel production of documents. Charter § 16.114.

2. Restrictions on commissions

Along with giving powers to commissions, Charter section 4.102 also restricts how a commission may deal with the administrative affairs of its department:

Each board or commission, relative to the affairs of its own department, shall deal with administrative matters solely through the department head or his or her designees, and any dictation, suggestion or interference herein prohibited on the part of any member of a board or commission shall constitute official misconduct; provided, however, that nothing herein contained shall restrict the board or commission's power of hearing or inquiry as provided in this Charter.

This restriction, which originated in the 1932 Charter, establishes a chain of command that governs the operation of departments under commissions. The commission sets policy and communicates that policy to the department head, who in turn is responsible for its execution. See City Attorney Opinion 90-01. There is no prohibition against a board or commission dictating administrative policy for its department, so long as it proceeds in the manner provided by the Charter.

The requirement that a commission address administrative matters solely through the department head does not apply to actions taken through the commission's power of hearing or inquiry. Charter § 4.102. "The commission's power of inquiry includes the authority to call any department officer or employee before the commission to answer questions regarding the operations of the department. But if the commission wants to make changes in departmental operations as a result of those inquiries, it must still address its directives to the department's chief executive officer." City Attorney Opinion 90-01, p. 4.

B. The role of and restrictions on individual commissioners

The Charter places the power and duties of a board or commission in the body as a whole, not in individual members. Charter § 4.102. The Charter, as well as State law and the City's Sunshine Ordinance, requires boards and commissions to act at public meetings. Charter § 4.104(a)(2); Cal. Govt. Code § 54953(a); Admin. Code § 67.5. A quorum of the board or commission must be present for the body to act. Charter § 4.104(b); see also Cal. Govt. Code § 54952.6 (defining "action taken" as a collective decision or commitment made by a majority of members of the body). Thus, commissioners lack the authority, as individuals, to exercise powers of the board or commission, although the body may designate individual commissioners to perform assigned duties, such as monitoring the progress of a departmental program and reporting on the program to the body.

In addition, as noted above, Charter section 4.102 provides that "any dictation, suggestion or interference [in administrative affairs] herein prohibited on the part of any member of a board or commission shall constitute official misconduct" Thus, in addition to requiring that a board or commission deal with administrative matters solely through the department head or the department head's designees, section 4.102 prohibits individual members of boards and commissions from dictation, suggestion, or interference in administrative matters. This prohibition does not prevent individual commissioners from requesting information from the department head about the department's operations. With the department head's consent, commissioners may also seek information directly from department staff.

C. The role of commission officers

Unless the board or commission's rules or enacting legislation provide otherwise, neither the president nor vice-president of a body has any greater authority than any other member. As noted below, the Charter permits a board or commission to adopt rules and regulations consistent with the Charter and City ordinances. Charter § 4.104(a)(1). Under this authority, most Charter boards and commissions adopt rules providing for the election of a president and possibly other officers. The president presides over meetings and may call special meetings of the body. Cal. Govt. Code § 54956(a); Admin. Code § 67.6(f).

If the board or commission so chooses, it may give additional powers to the president in its rules or bylaws. Frequently, such rules authorize the president, operating often in conjunction with the department head, to set agendas for meetings. In addition, some rules authorize the body's president to create committees and/or assign members to committees, or to act as a spokesperson for the body. Even if not formalized by rule or bylaw, in some instances the longstanding custom or practice of a board or commission will include the president's exercising some of these powers, such as setting the agenda for meetings and on occasion serving as the body's spokesperson. When speaking publicly regarding the business of the body, the president must clearly state whether the president is speaking personally or for the body. If the latter, the president must have authority to do so.

Typically the vice-chair of a board or commission will preside over meetings in the chair's absence. If the vice-chair also is absent, the body should begin its meeting by voting to determine which member will serve as acting chair for that meeting.

D. The role of a department head

The Charter and Administrative Code set forth the responsibilities of department heads. The department head is responsible for the administration and management of the department. Charter § 4.126; Admin. Code § 2A.30. Among other things, department heads may:

- Appoint qualified individuals to fill positions within the department that are exempt from the civil service provisions of the Charter, and discipline or remove such employees. Charter § 4.126; Admin. Code § 2A.30.
- Act as the appointing officer under the civil service provisions of the Charter for the appointing, disciplining, and removal of employees. Admin. Code § 2A.30; Charter § A8.329.
- Issue or authorize requisitions for the purchase of materials, supplies, and equipment required by the department. Admin. Code § 2A.30.
- Adopt rules and regulations governing matters within the jurisdiction of the department, subject, if applicable, to Charter section 4.104(a)(1). Charter § 4.126.
- With the approval of the City Administrator, reorganize the department. Charter § 4.126.

Thus, the department head acts as the day-to-day manager of the department, subject to the direction of the board or commission and the Mayor. Unless the Charter or Municipal Code expressly provide otherwise, the law does not require the department head to seek the body's approval before signing contracts and making other decisions on behalf of the department. Nevertheless, the board or commission and the department head may choose as a matter of policy which matters warrant the body consideration.

Department heads under a board or commission generally serve at the pleasure of the body. Unless the Charter expressly provides otherwise, only the board or commission may remove the department head. One exception to this principle is that the Mayor acting alone, in addition to the Police Commission, may remove the Chief of Police. Charter § 4.109. And one exception to the principle that department heads serve "at will" is that, following a probationary period for the Director of Elections, the Elections Commission may remove the Director only "for cause." Charter § 13.104. Further, as previously noted, the Mayor may request that a board or commission remove its department head, and the body must act, one way or the other, on that request within 30 days. But the board or commission, not the Mayor, must make the final decision whether to remove the department head. Charter § 4.102(6).

The Charter does not specify who becomes department head when the position becomes vacant, for example, due to resignation, retirement, death, or incapacity to serve. Yet at all times someone must have the powers of the department head. The person who is serving in the next highest position in the department, i.e., the person whom the department head

typically designates to run the department when the department head is absent, will function as department head until a new department head is appointed. See, for instance, Memorandum to San Francisco Police Commission re Designation of Assistant Chief Godown to fulfill the duties of Chief of Police, dated January 12, 2011, available on the Legal Opinions section of the City Attorney's Office's website.

E. The role of commission secretary

Subject to the budgetary and fiscal provisions of the Charter, each Charter board or commission may appoint a secretary to manage the affairs and operations of the body. Charter § 4.102(9). Generally, the secretary is responsible for: arranging board or commission meetings; preparing and distributing notices, agendas, minutes, and resolutions of the body; providing information to the public regarding the body's affairs; maintaining its files and records; and carrying out additional duties as directed by the body. The secretary is also responsible for notifying commissioners of mail, including e-mail, addressed to them, and for ensuring that they have an opportunity to read such mail if they so choose.

Usually, a board or commission secretary is appointed by and serves at the pleasure of the body. The secretary's duty is to the body as a whole, not to individual members. Accordingly, a commissioner does not have the right to demand from the secretary reports, favors, or special considerations beyond what the commissioner is entitled to as a member of the public. If a commissioner wants information that will require a significant amount of staff or secretarial time, the commissioner should bring the request to the commission to determine whether the secretary (or other staff) should pursue the task.

F. The role of the City Attorney

The City Attorney is the legal counsel for the City. In that capacity, the City Attorney's Office represents the City and its officers and employees in lawsuits; drafts and approves legislation, contracts, and other documents; and provides legal advice to the City and its officers and employees. Charter § 6.102. The City Attorney's powers and duties include the broad range of functions that attorneys customarily perform for clients in both the public and the private sectors. Likewise, the attorneys in the City Attorney's Office are subject to the same rules of professional conduct that apply to all attorneys in California.

1. The City is the client of the City Attorney's Office

The City as a whole is the client of the City Attorney. While the City can act only through individual officers and employees or constituent bodies, such as boards and commissions, those City actors are not separate clients of the City Attorney's Office. Accordingly, the Office does not have a conflict of interest in advising multiple City officers and departments, who often may have differing policy views about issues giving rise to the need for legal advice. See, e.g., *Ward v. Superior Court*, 70 Cal.App.3d 23 (1977). The Office does not have a separate attorney-client relationship with individual officers or entities who act on the City's behalf.

A Deputy City Attorney assigned as counsel to a department will typically become familiar with and often expert in laws affecting that department, and may gain an understanding of

its special needs and interests. But, based on subject matter expertise, the Deputy may be assigned a task, such as drafting an ordinance for a member of the Board of Supervisors, that is at odds with the department's views or preferences. In a similar vein, a Deputy City Attorney may be responsible for drafting, for different Supervisors, different ordinances on the same subject that may have policy objectives that are sharply at odds with each other. These examples illustrate that specific components of City government are not discrete clients of the City Attorney's Office, but rather are all parts of the same client – the City.

For more information on the City as a whole being the client of the City Attorney, see the memorandum entitled "Client of the City Attorney" (December 12, 2003), available online at the City Attorney's website.

This legal principle stems from two authorities: The Charter and the California Rules of Professional Conduct. Charter section 6.102 designates the elected City Attorney as the legal representative of the City as a whole. The purpose of creating an elected City Attorney was to ensure that the City Attorney would serve the people of San Francisco rather than any particular City official. "Made appointive by either a Mayor or Chief Administrative Officer, [the City Attorney] would be exposed to the possibility of conflicting allegiances." Francis V. Keesling, *San Francisco Charter of 1931*, at p. 41 (1933). With one City Attorney representing the City as a whole, the City speaks with one voice on legal issues and avoids the chaos, as well as taxpayer expense, that would result if each City department could hire its own counsel to represent its view of the City's interests.

The California Rules of Professional Conduct also provide that the City as a whole is the client of the City Attorney. The Rules specify that when representing any organizational client, whether a corporation or a municipality, a lawyer must treat the organization as the client, acting through the highest officer, employee, or constituent part overseeing each particular issue. Cal. Rules of Prof. Cond. 3-600(A); see also Rule 1.13, ABA Model Rules of Prof. Cond. Thus, the City Attorney generally does not have a conflict in representing multiple persons and/or bodies that are part of City government. For example, the State Bar has explained that a city attorney, asked to advise both a mayor and a city council regarding the power to adopt an ordinance where the two city actors disagreed on the legality and appropriateness of the action, does not have a conflict of interest and may advise both the mayor and the city council. Both have a role, at different times, in speaking for the city on the legislation, and neither may sue the other over the dispute. See Cal. State Bar Ethics Op. No. 2001-156.

Notwithstanding its primary role in representing the City, the City Attorney's Office may enter in other types of attorney-client relationships. First, the City Attorney, under a contractual arrangement, sometimes represents separate legal entities that are related to but not part of the City, such as the San Francisco County Transportation Authority or the Successor Agency to the San Francisco Redevelopment Agency. In addition, as required by state law, the City Attorney sometimes represents officers and employees in their individual capacities in tort lawsuits against them for acts performed in the course and scope of their City employment.

2. Attorney-client privilege

Non-public advice that the City Attorney provides to City officials acting in their official capacities is confidential and privileged. See Cal. Evid. Code §§ 952, 954; Cal. Rule of Prof. Cond. 3-100.

Only the City, acting through the body or office to whom the City Attorney directs the attorney-client communication may waive the attorney-client privilege. See Cal. Evid. Code § 912; *People ex rel. Lockyer v. Superior Court*, 83 Cal. App. 4th 387, 398 (2000); *Ward v. Superior Court*, 70 Cal.App.3d 23, 35 (1977); Cal. Rule of Prof. Cond. 3-600. When the City Attorney provides confidential advice directly to an individual City officer or employee, only that individual recipient may waive the privilege on behalf of the City.

When the City Attorney provides confidential advice to a board or commission, only the body to whom the City Attorney directs the communication – and not its individual members – may waive the privilege and disclose the confidential information. And, because the privilege is held by the body as an institution rather than the particular individuals constituting the body at the time it received the legal advice, the body may waive the privilege at any time, including in the future when the membership of the body has changed. But because of the sensitivity of confidential legal advice this Office provides, City officials should not waive the privilege by disclosing the advice without conferring with the City Attorney’s Office first. If a board or commission waives the privilege, the advice becomes a matter of public record available to any member of the public upon demand. Cal. Gov’t Code § 6254.5.

For additional guidance concerning waiver of the attorney-client privilege, consult the City Attorney’s August 20, 2009 Memorandum entitled “Disclosure of Attorney-Client Privileged Advice from the City Attorney’s Office” available on the City Attorney’s Legal Opinions webpage.

3. Respecting confidences within City government

While the City is the client of the City Attorney, when an individual City actor requests advice and asks that the request not be shared with others, the practice of the City Attorney’s Office is to honor that request to the extent possible. This practice allows each City official to obtain the legal advice the City official needs to perform organizational functions, without concern that the discussions will be shared with someone with whom the official has a policy disagreement.

This practice is based on principles of comity and prudence. The City Attorney respects the autonomy, needs, and policy views of different entities and individuals in City government and recognizes there may be disagreements among them. Further, if the City Attorney’s Office freely disclosed within City government its legal advice given to subparts of the government, officials and employees would probably become less inclined to seek legal advice, which would be contrary to the best interests of the City.

But this practice of respecting confidences within City government does not entitle an officer or employee to have the City Attorney withhold that same advice from other persons or entities acting on behalf of the City. Because the City as a whole is the client of the City Attorney’s Office, no breach of attorney-client confidentiality arises from sharing such

communications within City government. To the contrary, one of the roles of the City Attorney's Office is to provide consistent, objective legal advice to all affected policy makers. If two City officers ask for confidential legal advice on the same question, the City Attorney will provide the same legal advice to each of them. For the same reasons, City officers and employees need to understand that they may not demand that a Deputy City Attorney not consult with other Deputy City Attorneys on a legal matter. Each Deputy City Attorney will consult with the appropriate colleagues to ensure the accuracy and consistency of the advice to be provided.

The City Attorney may share advice with multiple City officials in other limited circumstances. For example, if a member of the Board of Supervisors requests this Office to draft an ordinance that the Office believes raises serious legal questions, we will advise the member about the legal problems, but will also provide the same advice to the full Board of Supervisors and the Mayor if the ordinance is introduced. And in limited circumstances, where an official has a legally recognized "need to know," the City Attorney will have to share information obtained from one part of City government with that official.

4. Consulting outside attorneys

On occasion, City officials may wish to consult with attorneys who do not work for the City Attorney's Office. City officials may discuss City business with a person who is not a City official or employee, including a private attorney, so long as such discussions do not divulge privileged advice from the City Attorney's Office or other confidential City information that is not available to the general public. But before consulting outside attorneys, City officials should be aware of certain considerations and risks.

Discussions with persons outside the City Attorney's Office may subject the City and the commissioner to legal risk. Non-attorneys could be called to testify against the City or one of its officials regarding the content of their discussions, and a private attorney, who owes no duty of loyalty to the City, could attempt to sue the City or pressure the City into settlement using as a roadmap the City Attorney's legal analyses and strategies that a City official inadvertently or intentionally communicates to private counsel.

Additionally, it may be in the City official's best interests to consult with the City Attorney's Office rather than rely on the advice of an outside attorney. A City official, though free to consult private counsel, is well advised to seek the advice of the City Attorney with regard to that official's public duties powers and responsibilities.

Lastly, the unauthorized disclosure of confidential communications can lead to significant penalties for the individual making the disclosure. City law prohibits City officers and employees from "willfully or knowingly disclos[ing] any confidential or privileged information, unless authorized or required by law to do so," or from using confidential or privileged information to advance the private interest of themselves or others. C&GC Code § 3.228. An official who violates these laws can be subject to administrative penalties, civil penalties of up to \$5,000 per violation, and criminal penalties. *Id.* § 3.242. A violation can also subject the City official to removal from office due to official misconduct. Charter § 15.105.

5. Due process screens

At times the City Attorney will assign one group of lawyers to a City board, commission, or hearing officer that is adjudicating a matter, such as an appeal of a permit, tax assessment, or employment decision, and will assign a separate group of lawyers to the departmental staff appearing before the board, commission, or hearing officer. The two groups do not share information about the pending matter.

A screen of this sort dividing lawyers within the City Attorney's Office is not made for reasons of legal ethics; in such a circumstance, the City, on both sides of the divide, is still the client, and the City Attorney's Office's provision of advice to and representation of both entities does not pose a conflict of interest. But to protect the due process interests of persons appearing before the adjudicating board, commission, or hearing officer, the City Attorney assigns and screens off from one another separate lawyers to advise that body and to represent the City department presenting the matter to the body.

6. The City Attorney's role in providing ethics and open government advice

The preceding discussion about the role of the City Attorney is particularly relevant to legal advice this Office provides to public officials about the ethics and open meeting laws discussed in the other parts of this Guide. When City officers and employees seek advice on ethics laws or open meeting laws, the City Attorney's Office does not provide that advice to the officer or employee in that person's individual capacity, but rather in that person's capacity as a City actor performing City duties. The individual City officer or employee does not have a separate attorney-client relationship with the City Attorney's Office.

The City Attorney's Office generally does not disseminate the information a person provides when seeking assistance in complying with these laws, nor does the Office disclose advice that it has provided to individual officers or employees unless the individual consents to the disclosure. Section 67.24(b)(1)(iii) of the Sunshine Ordinance purports to require the disclosure of such advice, when provided in writing, but a state appellate court has held that the City's Charter preempts this provision. See *St. Croix v. Superior Court*, 228 Cal.App.4th 434 (2014). Accordingly, the attorney-client privilege as provided in State law for municipal governments is not limited in any way by City law.

But the Office may share that information or advice with other City officials who require that information to perform their functions. For example, if this Office advises a member of a commission not to participate in the commission's discussion on a contract because of a conflict of interest and a third party later asks the Office whether the commissioner has a conflict, we generally will decline to discuss the details of our advice. But if that commissioner proceeds to vote on the contract anyway, the City Attorney's Office will advise the full commission that the individual commissioner has a conflict of interest. The commission requires this information because the conflict of interest could invalidate the commission's actions on the contract.

The Office encourages City officials to contact us for advice before taking any action that could violate the ethics laws described in this Guide. The Office does not provide ethics

advice to individual officials about activities that have already occurred, except in rare instances when the Office may advise about whether a potential conflict affected the validity of an official action or could compromise other official City business.

Finally, the Sunshine Ordinance states that the City Attorney shall not act as counsel to a City employee or custodian of a public record for purposes of denying access to the public. Admin. Code § 67.21(i). This provision does not prohibit the City Attorney from performing the Charter-mandated function of advising departments on all legal matters, including public records issues. Where the law permits or requires a department to deny a public records request, the City Attorney is duty bound under the Charter and Rules of Professional Conduct to so advise the department upon request. But this provision serves as a reminder that in performing that advisory function, the City Attorney must remain faithful to state and local open government laws and decline to defend denial of access to a public record where no plausible legal basis supports denial.

G. City contracting laws

City law requires competitive bidding on most contracts to protect against fraud, corruption, and favoritism as well as to ensure that honest bidders participate in the contracting process. See, e.g., Admin. Code § 21.1. City officers and employees must follow these processes when awarding any City contracts. While public City Attorney opinions and other City resources explain these laws in greater detail, we mention them here to stress the importance of ensuring fair processes in government contracting decisions.

VII. Operations of boards and commissions

A. Governing law

The Charter sets forth the general powers and duties of City boards and commissions in sections 4.102 through 4.104. The Charter often provides more specific powers and duties for each Charter body. Also, the Municipal Code establishes additional duties for some boards and commissions.

In addition to the local laws that govern boards and commissions, some state laws affect their operations. For example, as described in Part Three, state open meeting and public records laws, along with their local counterparts, apply to the operations of City bodies.

This section summarizes some of the principles pertaining to the operation of boards and commissions. Certain aspects of this subject are also discussed in Part Three.

B. Rules and regulations

In addition to the laws described above, a board or commission may adopt rules and regulations consistent with state and local law. Charter § 4.104(a)(1). These bodies often adopt regulations that specify the manner in which they will implement the duties given

them in the Charter or in an ordinance, or clarify ambiguities in laws they are charged with enforcing.

A board or commission seeking to adopt, amend, or repeal a rule or regulation must give at least ten days' notice of a hearing regarding such a proposal. Charter § 4.104(a)(1). The board or commission should post notice of the hearing in the same manner as other meeting notices – at the Main Public Library, and on the board or commission's website. It may be a stand-alone notice, but it is also permissible to include the notice on the agenda for a meeting of the board or commission, if it is displayed prominently on the agenda and readily visible to the reader. Whatever the form of the notice, it must comply with the ten-day requirement.

A copy of the rules and regulations, once adopted, must be filed with the Clerk of the Board of Supervisors and be available at the central office of the board or commission and at the Main Public Library. Charter § 4.104(a)(1); Admin. Code §§ 8.15, 8.16.

A board or commission's rules of order or bylaws address matters relating to the operation of the body that are not addressed by the Charter, Municipal Code, or other state or local laws. Such rules may address matters such as the election, terms, and duties of officers; the establishment of the body's regular meeting time and place; the procedure for setting agendas; the procedure for consent calendars (if any); and procedures relating to the establishment and appointment of committees of the board or commission. The bylaws of many bodies provide that Robert's Rules of Order govern the commissions' operations where the bylaws do not address a matter. But, just as a commission may not adopt any rule that conflicts with state or local law, it may not rely on a provision of Robert's Rules that is inconsistent with those laws. Subject to state and local law, boards and commissions are ultimately responsible for construing their bylaws and parliamentary issues that may arise in meetings.

C. Quorum

Generally, under the Charter, a majority of the voting members of a board or commission constitutes a quorum for the transaction of business. The majority must consist of a majority of the number of members designated by law, rather than the number of seats actually filled. Charter § 4.104(b). See also Cal. Govt. Code § 54952.2(a) (defining "meeting" by reference to majority of members); Admin. Code § 67.3(b) (same).

Many boards and commissions have seats designated for persons with certain backgrounds, characteristics or expertise. For example, seats may be divided among two or more appointing authorities; may be designated for members with ties to a neighborhood, the community, a profession, or possessing some other credential or experience; or may be reserved for particular types of individuals, such as the disabled. As a general rule, unless the law creating the body with the restricted seat expresses a contrary intent, such a body may conduct business where a restricted seat is vacant so long as the body has and retains a numerical quorum.

When a quorum of a board or commission fails to attend a scheduled meeting or the body loses a quorum because of the departure of some of its members, the only official actions that the body may take are to: (1) fix the time to which to adjourn; (2) adjourn the meeting; (3)

recess the meeting; or (4) take measures to secure a quorum. See generally Cal. Govt. Code §§ 54955, 54955.1. Any other action taken by the body is void.

Once a meeting ceases, members of the board or commission may remain to discuss any matter they choose among themselves or with the members of the public who have attended. If documents are collected, notes taken, or a recording made, they may be presented at the next meeting of the board or commission so that they may become part of its record.

If there is a lack of a quorum at a meeting of a board or commission that has committees, the parent body may not reconstitute itself as a committee of the whole or as one of its committees, even if a quorum of that committee happens to be present. Such a committee meeting would require a separate notice and posting of an agenda for a meeting of that particular committee.

D. Voting

Boards or commissions may not vote by secret ballot. They must conduct all votes, other than those permitted in a closed session, publicly. Further, an absent member may not vote by proxy. See generally Charter §§ 2.104, 2.108, 4.104(a)(3), 4.104(b); Cal. Govt. Code § 54953(c); Admin. Code §§ 1.29, 67.16.

Also, once it has taken an action, the policy body must disclose the action and announce the vote of each member of the body. Cal. Govt. Code § 54953(c)(2). Similar but more specialized rules govern disclosing of actions taken and votes in closed session. With certain exceptions, members of boards or commissions must vote on every matter before them. First, as we note elsewhere in this Guide, a member may not vote on a matter where the member's vote would violate a conflict of interest law. Second, by a majority vote of members present, a board or commission may excuse a member from voting on a matter for any reason. Charter §§ 2.104(b), 4.104(b); Admin. Code § 1.29. Also, as we discuss elsewhere in this Guide, as a general rule, if the body is hearing an adjudicative matter, such as deciding whether to grant a permit application, participation of a member who has not been present during part of the hearing and has not reviewed the evidence that was submitted during the member's absence could violate due process rights of the party before the body.

The Charter requires that the number of votes necessary to approve an action (i.e., majority, 2/3, 3/4, etc.) be based on the total number of seats, rather than the number of seats currently filled, the number of members present, or the number of members qualified to vote on the item. Charter § 4.104(b). But a board or commission may adopt a rule or bylaw that authorizes the body to decide procedural matters based on a majority vote of the members present, provided a quorum is present. Charter § 4.104(b).

E. Election of officers

As we describe above, boards or commissions generally adopt rules establishing officers and terms for the officers. Some of these bodies establish in their bylaws or rules a particular method for electing officers. Voting for officers, like all votes, must occur publicly and only after there has been an opportunity for public comment.

Where a board or commission has not adopted a specific process for electing officers, it may look to Robert's Rules of Order for guidance. Robert's Rules of Order provide several methods for electing officers. City bodies frequently use the following process. First, the presiding officer takes public comment on the agenda item. Then the presiding officer requests nominations for the office from the members of the body. No second is required under Robert's Rules of Order. When no additional nominations are offered, the presiding officer closes the nominations. The commission then votes on the nominations in the order they were received. The first candidate to receive a majority of the votes is elected to the office.

F. Vacancies on boards and commissions

By the end of each calendar year, the Board of Supervisors and the Mayor must prepare a list of all boards, commissions, and committees for which they have the power to make appointments, showing current appointees and date of appointment and qualifications for office, and the expiration dates for each term,. The appointing authority must give public notice as specified by law of any unscheduled vacancy to enable citizens to pursue the opportunity to participate in and contribute to the operations of local government. Cal. Govt. Code §§ 54970-74.

VIII. Role of the Board of Supervisors: Charter section 2.114, the prohibition against interference in administration

The Charter establishes the Board of Supervisors ("Board") as the City's law-making body. In support of that function, the Charter confers upon the Board the "power of inquiry and review" regarding all matters affecting the conduct of any City department or office. Charter § 16.114. The Charter also gives the Board broad powers regarding the budget. Further, except for individual personnel and specific contract matters, the Charter generally allows the Board to adopt legislation setting policies governing the operations of individual departments. Charter § 2.114.

At the same time, the Charter is based on a strict principle of separation of powers between the Board, as the legislative branch, and the executive branch under the Mayor, City Administrator and the various City boards, commissions, and executive officers. Therefore while the Board may adopt legislation setting policies for the executive branch, such legislation may not authorize the Board to exercise, administer, or oversee the administration of those policies.

The Charter's non-interference provision establishes two central rules:

- Members of the Board must generally communicate with departments through the department heads unless the Board is formally exercising its power of inquiry under Charter section 16.114 or a Board member is testifying regarding administrative

matters, other than specific contract and personnel matters, at a public meeting of a City board or commission.

- Neither the Board, its committees, nor any of its members may “dictate, suggest, or interfere with” administrative actions of the City Administrator, or of department heads under the City Administrator or department heads under the City Administrator, or under the boards and commissions of the executive branch. But with some exceptions, the Board may adopt ordinances regarding administrative matters, again, other than specific contract and individual personnel decisions. And the Board may adopt nonbinding resolutions exhorting a particular department to change the way it operates.

Under the Charter, violation of section 2.114 constitutes official misconduct. See Section V(A) above for a description of official misconduct proceedings.

A. Communications between the Board of Supervisors and a department

1. General rule

Section 2.114 provides that members of the Board must communicate with City departments only through the City Administrator for departments under the City Administrator, or through the department head or responsible board or commission for other City departments. Board members may also contact other department employees whom the department head has designated, and may contact the deputy in charge of the department in the department head’s absence.

This directive broadly covers all communications addressing administrative “or other functions” for which departments are responsible.

2. Exception: exercising the power of inquiry

As we describe above, it is generally improper for a Board member to contact department employees without the consent of the department head. But in the context of an official Board inquiry into a department’s operations, the Board or a member authorized by the Board may contact directly any City employee having potentially relevant knowledge. Charter § 16.114.

As a legislative body, the Board of Supervisors has a broad right to seek information about the governance of the City. Charter § 16.114. Courts have interpreted broadly the scope of inquiry related to the legislative process:

“The Legislature’s right to obtain accurate and up-to-date information on matters of public concern cannot be disputed. The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching

as the potential power to enact and appropriate under the Constitution.” *Connerly v. State Personnel Board*, 92 Cal.App.4th 16, 62 (2001) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959)).

B. Non-interference with administrative matters

1. General rule

The second paragraph of section 2.114 sets forth the core prohibition on interference with administrative matters:

Neither the Board of Supervisors, its committees, nor any of its members, shall have any power or authority, nor shall they dictate, suggest or interfere with respect to any appointment, promotion, compensation, disciplinary action, contract or requisition for purchase or other administrative actions or recommendations of the City Administrator or of department heads under the City Administrator or under the respective boards and commissions. The Board of Supervisors shall deal with administrative matters only in the manner provided by this Charter, and any dictation, suggestion or interference herein prohibited on the part of any Supervisor shall constitute official misconduct; provided, however, that nothing herein contained shall restrict the power of hearing and inquiry as provided in this Charter.

This restriction prohibits interference with a range of departmental activities: employment matters, contracting and purchasing decisions, and other administrative decisions including how to allocate resources between departmental functions, to whom to assign given functions, prioritization of functions, internal accounting, monitoring, training, and resolution of questions or disputes with individual citizens. By prohibiting interference in administrative matters, section 2.114 attempts to limit Board involvement in areas that historically have presented the greatest risks of favoritism and corruption.

The ban on interference applies not only to the Board as a body, but also to its committees and individual members. And the restriction can apply to words as well as actions. A threat that the Board, its committees, or members make to a department head to engage in any of the prohibited activities may violate section 2.114 even if they do not actually take any further steps to carry out the threat.

2. Exceptions

a. Resolutions

Section 2.114 does not prohibit the Board, as opposed to individual members, from offering suggestions about departmental matters. See *Eller Outdoor Advertising v. Board of Supervisors*, 89 Cal.App.3d 76, 81-82 (1979). Rather, section 2.114 prohibits the Board from “dictating” or “commanding” departments on administrative matters, in the sense of actual intervention or interference. *Id.* The full Board, but not individual members, may adopt resolutions expressing the Board’s views on City departmental operations. In those resolutions, the Board may urge, but not require, departments to take certain actions. This exception regarding nonbinding resolutions does not limit the express authority of the Board

under Charter section 2.114 to adopt policy ordinances that bind departments in how they operate, as discussed below in section (d).

Section 2.114 prohibits the Board and its individual members from directing departments with regard to either specific contracts or specific personnel decisions. Charter section 9.118, which requires Board approval of contracts above dollar or term thresholds specified in that section, does give the Board limited authority over particular contracts. The Board may not amend a contract that it receives for approval under section 9.118. Nevertheless, it may inform the department of the reasons it will not approve the contract in its current form and make suggestions as to the changes required to make the contract acceptable.

Therefore, at the conclusion of a legislative inquiry in which the Board uncovers mismanagement within a department or a bad contracting decision, neither the Board nor an individual Board member may suggest or direct any action with regard to either the contract or the responsible employees.

b. Adopting the City's budget

Section 2.114 does not prohibit the Board or its members from allocating City resources through the budgetary process. See Charter §§ 9.101, 9.103, 9.105, and 9.113. Adoption of a budget is a core legislative function. *Hicks v. Board of Supervisors*, 69 Cal.App.3d 228, 235 (1977). When the Board as a whole or an individual Board member explains or advocates a position as part of the budgetary process or in contemplation of the Board's role in that process, that speech falls within the legislative prerogative of the Board, even if that speech comments on the performance of executive branch employees or the administration of executive branch departments. Such commentary would not ordinarily violate the Charter's ban against interference with administrative affairs.

c. Testifying at public meetings

Section 2.114 also allows individual Board members to testify regarding administrative matters at public meetings of City boards and commissions. This exception recognizes that the delivery of remarks at open, publicly noticed meetings subject to response and rebuttal by the full body of commissioners and by members of the public counterbalances the dangers of Board members engaging in improper intimidation or influence peddling. Therefore, an individual Supervisor does not violate section 2.114 by testifying at a public meeting of a commission regarding a department's administration of City affairs under that department's jurisdiction.

But section 2.114 still forbids individual Board members even when testifying at City commission meeting to make suggestions or recommendations relating to individual personnel or specific contract decisions.

d. Adopting legislation

The Board may adopt binding, department-specific ordinances that affect administrative matters, without violating the non-interference rule. The Board can adopt laws of general application setting uniform, City-wide policies regarding matters that, if decided individually, would be considered administrative matters.

There are limits to this authority to adopt legislation. First, the Board cannot bind a department that has Charter-derived exclusive authority over its affairs or assets if the Board's legislation is directed only at that department.

Second, legislation that applies to all departments must not impair the capacity of an exclusive jurisdiction department to discharge one of its core functions.

Third, under Section 2.114 (and the Charter's fundamental separation of powers), the Board may only adopt ordinances that constitute legislative enactments. For example, the Board may not adopt an ordinance directing the Department of Public Works to issue a permit to a particular individual because the issuance of a permit is not a legislative act. Likewise, while the Board may adopt legislation setting the standards and procedures for issuing a class of permits, it may not itself execute those standards through the determination of whether an applicant has met those standards. And since the Board may not exercise executive powers except as authorized by the Charter, the Board also may not adopt legislation that would overrule the department's action on a specific application.

Part Two: Conflicts of interest, financial disclosure & governmental ethics laws

City officers and employees are subject to strict conflict of interest laws. State laws, particularly the Political Reform Act (Cal. Govt. Code section 87100, *et seq.*), impose broad conflict of interest rules, gift limits, and financial disclosure requirements. The City and County of San Francisco enforces additional conflict of interest rules and gift limits.

In this part of the guide we describe generally the State and local conflict laws that govern the conduct of public officials.

I. ‘Public office is a public trust’

Charter section 15.103 provides that “[p]ublic office is a public trust and all officers and employees of the City and County shall exercise their public duties in a manner consistent with this trust.” This provision expresses one of the underlying purposes of conflict of interest laws. Section 15.103 authorizes the City to enact laws to implement this fundamental obligation of public service by providing:

The City may adopt conflict of interest and governmental ethics laws to implement this provision and to prescribe penalties in addition to discipline and removal authorized in [the] Charter. All officers and employees of the City and County shall be subject to such conflict of interest and governmental ethics laws and the penalties prescribed by such laws.

The City’s ethics provisions, which the City adopted under this Charter section, are primarily found in the Campaign and Governmental Conduct Code, sections 3.200 through 3.244. The findings and purpose section, section 3.200, states that to ensure that the governmental processes promote fairness and equity for all residents and to maintain public trust in governmental institutions, the people of San Francisco have a compelling interest in regulating conflicts of interest and the outside activities of City officers and employees.

A. The San Francisco Ethics Commission

San Francisco’s Ethics Commission is responsible for implementing and administering local laws relating to political campaigns, lobbying, conflicts of interest, and governmental ethics. Charter § C3.699-10. The Commission provides advice and assistance to City officers, candidates for City office, and City employees regarding compliance with local governmental ethics laws. Charter §§ C3.699-11, C3.699-12.

The Ethics Commission also investigates complaints regarding the conduct of City officers and employees. Charter § C3.699-13. The Ethics Commission’s investigations are confidential to the extent permitted by State law. Charter § C3.699-13(a). In addition, local

law protects individuals who file complaints with the Ethics Commission – often known as “whistleblowers” – from retaliation for filing complaints. C&GC Code § 4.115.

The Ethics Commission office is located at 25 Van Ness Street, Suite 220, San Francisco, CA 94102. Copies of San Francisco’s ethics laws, Ethics Commission implementing regulations, and advice letters, as well as information about the complaint process, are available on the Commission’s website: <http://www.sfethics.org/>.

II. Conflicts of interest and financial disclosure

Several State and local laws prohibit City officials from participating in decisions in which they have a financial interest. In most cases, officials do not violate these laws if they disclose their financial interest and abstain from participating in or seeking to influence a decision in which the officials have an interest. But sometimes, an official with a conflict must choose between maintaining the financial interest and continuing to serve as a public official.

In this section we address laws on conflicts of interest and financial disclosure. In subsection A, we discuss the California Political Reform Act’s prohibition on conflicts of interest, which is the principal State law governing conflicts of interest. In subsection B, we address the Political Reform Act’s financial disclosure requirements, which are designed to prevent conflicts of interest. In subsection C, we address the Act’s prohibition on conflicts of interest arising from the solicitation or receipt of campaign contributions by certain appointed members of boards and commissions. In subsections D through G, we address other State and local conflict of interest provisions.

A. Conflicts of interest: the Political Reform Act

California’s Political Reform Act (the “Political Reform Act”) prohibits public officials from making, participating in making, or seeking to influence governmental decisions in which they have a financial interest. Cal. Govt. Code § 87100. Under the Political Reform Act, an official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, different from the effect on the public generally, on the public official’s economic interests. Cal. Govt. Code § 87103. When a public official has a conflict of interest under the Political Reform Act, the official must abstain from participating in the decision-making process, including any discussions or meetings leading up to the final decision. The official is not counted for purposes of establishing a quorum for that particular matter. In addition, a public official cannot attend a closed session or obtain or review a recording or any non-public information regarding the governmental decision in which the official has a prohibited conflict of interest.

Public officials: All City officers and employees are “public officials” subject to the conflict of interest rules in the Political Reform Act. Cal. Govt. Code § 82048(a). The Political Reform Act may also apply to “consultants” working for the City. Whether a “consultant” qualifies as a public official depends upon the nature and extent of the consultant’s work. See generally 2 C.C.R. § 18700.3; June 13, 2006 City Attorney Memorandum “Statements of Economic Interest Filing Requirements For Consultants” available on the City Attorney’s legal opinions

webpage. If the individual is not a public official, then the Political Reform Act does not apply to that individual's actions.

Financial interests: The Political Reform Act only applies to certain types of financial interests:

- Investments: a direct or indirect investment worth \$2,000 or more in any business entity;
- Business Positions: any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management;
- Real Property: a direct or indirect interest worth \$2,000 or more in any real property in the jurisdiction;
- Source of Income: any source of income (other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status) of \$500 or more, provided to, received by, or promised to the public official within the previous 12 months;
- Source of Gifts: any donor of, or any intermediary or agent for a donor of, a gift or gifts worth \$500 more in provided to, received by, or promised to the public official within the previous 12 months; and
- Personal Finances: the income, assets, and expenses of the public official or the public official's spouse, registered domestic partner recognized by State law, or dependent children.

Cal. Govt. Code § 87103; 2 C.C.R. § 18940.2. An "indirect" investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

If none of these financial interests are at issue, the Political Reform Act does not apply.

The California Fair Political Practices Commission ("FPPC"), which administers and enforces the Political Reform Act, has developed a four-question framework for assessing whether an officer or employee has a conflict of interest under the Act:

- Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?
- Will the reasonably foreseeable financial effect be material?
- Will the material financial effect on the public official's financial interest be distinguishable from its effect on the public generally?
- Is the public official making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision?

2 C.C.R. § 18700(d). If the answers to these four questions are all "yes," the Political Reform Act requires the public official to be recused from the government decision-making process creating the conflict of interest.

1. Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?

If the official's financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency, it is presumed that the financial effect of the decision is reasonably foreseeable. A financial interest is the "subject of" a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest.

There are also special rules regarding reasonable foreseeability with respect to real property interests. A real property interest is the "subject of" a proceeding if the proceeding:

- involves the adoption of or amendment to a general or specific plan, and the real property is located within the proposed boundaries of the plan;
- determines the real property's zoning (other than a zoning decision applicable to all properties designated in that category), annexation or de-annexation, or inclusion in or exclusion from any city, county, district, or other local government subdivision (other than elective district boundaries);
- would impose, repeal, or modify any taxes, fees, or assessments that apply to the real property;
- authorizes the sale, purchase, or lease of the real property;
- involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the real property or any variance that changes the permitted use of, or restrictions placed on, that real property; or
- involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to other similarly situated properties in the official's jurisdiction.

2 C.C.R. §§ 18701(a); 18702.2(a)(1)-(6).

If the financial interest is not named in or the subject of the decision, there is no presumption that any effect of the decision is reasonably foreseeable. In these circumstances, to be reasonably foreseeable, the financial effect need not be likely. But if the financial effect is a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. In assessing whether a financial effect is reasonably foreseeable, the official should consider the following non-exclusive list of the factors:

- the extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or another agency appointed by or subject to the budgetary control of the official's agency;

- whether the official should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care;
- whether the official has a financial interest that is of the type that would typically be affected by the terms of the governmental decision, or whether the governmental decision is of the type that would be expected to have a financial effect on similarly situated businesses and individuals in which the public official has a financial interest;
- whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's financial interests could compromise the public official's ability to act in the best interests of the public;
- whether the governmental decision would provide or deny an opportunity, or create an advantage or disadvantage for one of the official's financial interests, including whether the financial interest may be entitled to compete or be eligible for a benefit resulting from the decision; and
- whether the official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision in formulating a position.

2 C.C.R. § 18701(b). If it is not reasonably foreseeable that the decision will have a material financial effect under the applicable standard, then the public official does not have a conflict of interest under the Political Reform Act.

2. Will the reasonably foreseeable financial effect be material?

Under the Political Reform Act, a conflict of interest exists only if the effect of a decision on the official's economic interests would be "material." If it is not reasonably foreseeable that the decision will have a material financial effect under the applicable standard, then the public official does not have a conflict under the Political Reform Act.

Determining materiality turns on the type of financial interest at issue.

a. Decisions involving a financial interest in a business entity

For a business entity in which a public official either has an investment worth more than \$2,000 or for which the public official is a director, officer, partner, trustee, employee, or holds any position of management, the effect is material if the business entity:

- initiates the proceeding in which the governmental decision will be made by filing an application, claim, appeal, or request for other government action concerning the business entity;
- offers to make a sale of a service or a product to the official's agency;
- bids on or enters into a written contract with the official's agency;

- is the named manufacturer in a purchase order of any product purchased by the official's agency or the sales provider of any products to the official's agency that aggregates to \$1,000 or more in any 12-month period;
- applies for a permit, license, grant, tax credit, exception, variance, or other entitlement that the official's agency is authorized to issue;
- is the subject of any inspection, action, or proceeding subject to the regulatory authority of the official's agency; or
- is otherwise subject to an action taken by the official's agency, the effect of which is directed solely at the business entity in which the official has an interest.

2 C.C.R. § 18702.1(a).

For other types of governmental decisions, the financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity. Examples include decisions that:

- authorize, prohibit, regulate or otherwise establish conditions for an activity in which the business entity is engaged;
- increase or decrease the amount of competition in the field in which the business entity is engaged;
- increase or decrease the need for the products or services that the business entity supplies;
- make improvements in the surrounding neighborhood such as redevelopment projects, traffic/road improvements, or parking changes that may affect, either temporarily or permanently, the amount of business the business entity receives;
- decide the location of a major development, entertainment facility, or other project that would increase or decrease the amount of business the entity draws from the location of the project; or
- increase or decrease the tax burden, debt, or financial or legal liability of the business entity.

2 C.C.R. § 18702.1(b).

b. Decisions involving a financial interest in real property

i. Real property interests other than leasehold interests

To materially affect an official's real property interest, the governmental decision does not need to directly affect or involve the official's property. For example, the FPPC has a longstanding rule that any decision affecting any property located within 500 feet of the property line of the official's property is material. In addition to the "500-foot" rule, a

governmental decision made with respect to a real property interest is material when the decision:

- involves the adoption of or amendment to a general or specific plan, and the real property is located within the proposed boundaries of the plan (except as provided in the exception described below);
- determines the real property's zoning (other than a zoning decision applicable to all properties designated in that category), annexation or de-annexation, or inclusion in or exclusion from any city, county, district, or other local government subdivision (other than elective district boundaries);
- would impose, repeal, or modify any taxes, fees, or assessments that apply to the real property;
- authorizes the sale, purchase, or lease of the real property;
- involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the real property or any variance that changes the permitted use of, or restrictions placed on, that real property;
- involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to other similarly situated properties in the official's jurisdiction;
- would change the development potential of the real property;
- would change the income producing potential of the real property;
- would change the highest and best use of the real property;
- would change the character of the real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the real property, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the real property's market value; or
- would cause a reasonable person to believe that the governmental decision would likely influence the market value of the official's property.

2 C.C.R. § 18702.2(a).

ii. **Leasehold interests**

A governmental decision on any real property in which an official has a leasehold interest is material whenever the decision would:

- change the termination date of the lease;
- increase or decrease the potential rental value of the property;
- increase or decrease the rental value of the property, and the official has a right to sublease the property;

- change the official's actual or legally allowable use of the property; or
- impact the official's use and enjoyment of the property.

2 C.C.R. § 18702.2(b).

iii. **Exceptions**

For all real property interests, including leasehold interests, a decision is not material if:

- the decision solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities; or
- the decision solely concerns the adoption or amendment of a general plan and all of the following apply:
 - the decision only identifies planning objectives or is otherwise exclusively one of policy;
 - the decision is initiated neither by the public official nor by a person that is a financial interest to the public official;
 - the decision requires a further decision or decisions by the official's agency before implementing the planning or policy objectives, such as permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan;
 - the decision does not concern an identifiable parcel or parcels or development project; and
 - the decision does not concern the agency's prior, concurrent, or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan.

2 C.C.R. § 18702.2(c).

c. **Decisions involving a financial interest in a source of income**

For income received by an official, or the community property portion of income received by the official's spouse, for goods and services provided in the ordinary course of business (such as a salary), the financial effect is material if:

- the source is a claimant, applicant, respondent, contracting party, or is otherwise named or identified as the subject of the proceeding;
- the source is an individual that would be financially affected under the materiality standards that apply to the personal finances of a public official or the official's immediate family (see subsection e below);
- the source is an individual has an interest in a business entity or real property that would be materially affected under the standards applied to those types of financial interests (see subsections a and b above);

- the source is a nonprofit organization that would receive a measurable financial benefit or loss, or the official knows or has reason to know that the nonprofit organization has an interest in real property that would be materially affected under the standards applied to financial interests in real property (see subsection b above); or
- the source is a business entity that would be materially affected under the standards as applied to financial interests in business entities (see subsection a above).

2 C.C.R. § 18702.3(a).

For income from the sale of personal or real property belonging to the official (or the official's spouse, if the property is community property), the financial effect of the decision is material if the official knows or has reason to know that:

- the source is a claimant, applicant, respondent, contracting party, or is otherwise named or identified as the subject of the proceeding; or
- the source has an interest in a business entity or real property that would be materially affected under the standards applied to those types of financial interests (see subsections a and b above).

2 C.C.R. § 18702.3(b).

Nexus. In addition to the standards described above, any reasonably foreseeable financial effect on an official's source of income is material if the official receives or is promised income to achieve a goal or purpose that would be achieved, defeated, aided, or hindered by the decision. 2 C.C.R. § 18702.3(c).

Exception: Income from Retail Sales of a Business Entity. Income from an individual customer of a retail business is not material when the official has no reason to know that there is a significant monetary difference between the business provided by the individual customer and the general clientele of the business. The official has no reason to know that there is a significant monetary difference when either:

- the business is of the type that sales to any one customer will not have a significant impact on the business's annual net sales; or
- the business has no records that distinguish customers by amount of sales, and the official has no other information that the customer provides significantly more income to the business than an average customer.

2 C.C.R. § 18702.3(d).

d. Decisions involving a financial interest in a source of gifts

The financial effect of a governmental decision on the source of gifts to a public official is material if:

- the source is a claimant, applicant, respondent, contracting party, or is otherwise named or identified as the subject of the proceeding;

- the source is an individual that would be materially affected under the standards that apply to the personal finances of a public official or the official's immediate family (see subsection e below);
- the source is an individual has an interest in a business entity or real property that would be materially affected under the standards applied to those types of financial interests (see subsections a and b above);
- the source is a nonprofit organization that would receive a measurable financial benefit or loss, or the official knows or has reason to know that the nonprofit organization has an interest in real property that would be materially affected under the standards applied to financial interests in real property (see subsection b above); or
- the source is a business entity that would be materially affected under the standards as applied to financial interests in business entities (see subsection a above).

2 C.C.R. § 18702.4.

e. Decisions involving a financial interest in personal finances

For this category of financial interests, personal finances refer to the personal finances of a public official or his or her immediate family. The financial effect is material if the official or the official's immediate family will receive a measurable financial benefit or loss from the decision. 2 C.C.R. § 18702.5(a). But the following type of effects are not material for this type of financial interest:

- any establishment of or change to benefits provided under an employment or retirement policy for employees or retirees if the financial effect of the decision applies equally to all employees in the same bargaining unit or other representative group;
- payment of any travel expenses, to the extent allowed by law, incurred while attending meetings as an authorized representative of an agency;
- stipends received for attendance at meetings of any group or body created by law or formed by the official's agency for a special purpose, so long as the selecting body completes the FPPC Form 806 and posts the form on its website;
- the use of any government property, such as automobiles or other modes of transportation, mobile communication devices, or other agency provided equipment for carrying out the official duties of a position, including any nominal, incidental, negligible, or inconsequential personal use while on duty;
- any personal reward received by the official when using a personal charge card or membership rewards program, so long as the reward is no different from the reward offered to the public and is limited to charges made solely for the official's approved travel expenses; and
- a decision to fill a position on the body of which the official is a member.

2 C.C.R. § 18702.5(b).

3. Will the material financial effect on the public official's financial interest be distinguishable from its effect on the public generally?

If the public official's economic interest would be affected in the same manner as the public generally, as defined in the Political Reform Act, then the public official may participate in the decision. A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that:

- a significant segment of the public is affected; and
- the effect on his or her financial interest is not unique compared to the effect on the significant segment.

2 C.C.R. § 18703(a).

A “significant segment” of the public is at least 25 percent of:

- all businesses or non-profit organizations within the official's jurisdiction;
- all real property, commercial real property, or residential real property within the official's jurisdiction; or
- all individuals within the official's jurisdiction.

2 C.C.R. § 18703(b).

A “unique effect” on a public official's financial interest includes a disproportionate effect on:

- the development potential or use of the official's real property, or the income producing potential of the official's real property or business entity;
- an official's business entity or real property resulting from the proximity of a project that is the subject of a decision;
- an official's interests in business entities or real properties resulting from the cumulative effect of the official's multiple interests in similar entities or properties that is substantially greater than the effect on a single interest;
- an official's interest in a business entity or real property resulting from the official's substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage;
- a person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official; or
- an official's personal finances or those of his or her immediate family.

2 C.C.R. § 18703(c).

In addition, the following types of governmental decisions do not create a “unique effect” for these purposes:

- Public Services and Utilities. The decision establishes or adjusts assessments, taxes, fees, or rates for water, utility, or other broadly provided public services or facilities that are applied equally, proportionally, or by the same percentage to the official's interest and other businesses, properties, or individuals subject to the assessment, tax, fee, or rate.
- General Use or Licensing Fees. The decision affects the official's personal finances as a result of an increase or decrease to a general fee or charge, such as parking rates, permits, license fees, application fees, or any general fee that applies to the entire jurisdiction.
- Limited Neighborhood Effects. The decision affects residential real property limited to a specific location, and the decision establishes, amends, or eliminates ordinances that restrict on-street parking, impose traffic controls, deter vagrancy, reduce nuisance or improve public safety, provided the body making the decision gathers sufficient evidence to support the need for the action at the specific location.
- Rental Properties. The decision affects all renters of residential property within the official's jurisdiction, and only interests resulting from the official's leasehold interest in his or her residence are affected.
- Required Representative Interest. The decision is made by a board or commission and the official's seat on the board or commission legally must represent interests in a particular industry, trade, or profession or other identified interest. This provision applies only if the effect is on the industry, trade, or profession or other identified interest represented and there is no unique effect on the official's interest.
- State of Emergency. The decision is made pursuant to an official proclamation of a state of emergency when required to mitigate against the effects directly arising out of the emergency and there is no unique effect on the official's interest.
- Governmental Entities. The decision affects a federal, state, or local governmental entity in which the official has an interest and there is no unique effect on the official's interest.

2 C.C.R. § 18703(e).

4. Is the public official making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision?

An official is “making” a governmental decision when the official votes on a matter, makes an appointment, enters into a contract on behalf of the official’s agency, or otherwise obligates the official’s agency to a course of action.

An official is “participating in making” a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.

An official is “seeking to influence” a governmental decision if the official either:

- contacts or appears before any official in his or her agency or an official in another agency subject to the official's authority or budgetary control; or
- contacts or appears before any official of another agency for the purpose of affecting a decision, while acting or purporting to act within the scope of the official's duties.

Making, participating in, or influencing a governmental decision does not include actions that are solely ministerial, secretarial, or clerical. 2 C.C.R. § 18704.

5. Exception: legally required participation

In limited circumstances, even where an official has a conflict of interest, the official may still participate if the official's participation is legally required. This exception is very narrow. Participation is legally required only if there is no alternative officer or entity that may make the decision consistent with the purposes and terms of the statute authorizing the decision. This exception does not permit an official who is otherwise disqualified to break a tie or vote if a quorum of members of the agency who are not disqualified could be obtained. 2 C.C.R. § 18705. Before invoking this exception, officials should consult the City Attorney's Office to determine whether their participation is legally required in a given circumstance.

B. Financial disclosure under the Political Reform Act

In addition to prohibiting participation in government decisions that affect a public official's financial interests, the Political Reform Act requires public officials with significant decision making authority to publicly disclose their financial interests. This financial disclosure informs the public about a public official's economic interests and potential conflicts of interest.

1. Who is required to file Statements of Economic Interests?

All public officials (including elected officials, candidates for elective office, appointed officials, and employees) who make, or participate in making, governmental decisions that could affect their personal financial interests are required to file financial disclosure forms. Cal. Govt. Code §§ 87200, 87302. These forms are called "statements of economic interests," and are also known as "SEIs" or "Form 700s."

The list of officials and employees who are required to file SEIs is set forth in San Francisco's Conflict of Interest Code, in Chapter 1 of Article III of the San Francisco Campaign and Governmental Conduct Code. Individuals who hold positions listed in these sections are called "designated employees."

Appointing authorities of officers who file SEIs with the Ethics Commission must notify the Ethics Commission within 15 days that a person has been appointed to, or left office, to enable the Ethics Commission to monitor compliance with the SEI filing requirements. C&GC Code § 3.1-105(a).

2. What must be disclosed on Statements of Economic Interests?

Depending upon the scope of their decision-making responsibility and the positions they hold, public officials who are required to file SEIs must disclose some or all of their interests in real property located in San Francisco, investments, business positions, and income (including gifts and loans) received during the preceding year. See Cal. Govt. Code § 87302; 2 C.C.R. § 18730; C&GC Code § 3.1-100, et seq. In general, public officials must disclose the types of economic interests that could potentially lead to a conflict of interest under the Political Reform Act. For this reason, public officials must also report their spouse's, registered domestic partner's, or dependent children's economic interests in addition to their own interests. Likewise, officials must only report investments in, business positions in, and income received from entities that are "doing business in the jurisdiction." An entity does business in the jurisdiction if it has business contacts on a regular or substantial basis with a person who maintains a physical presence in the City and County of San Francisco. Contacts include manufacturing, distributing, selling, purchasing or providing goods or services, but do not include marketing via the Internet, telephone, television, radio, or printed media. 2 C.C.R. § 18230.

The amount of financial disclosure required depends upon the nature of the position held by a particular public official. State law requires some public officials, such as elected City officials and members of the Planning Commission, to file SEIs. San Francisco's Conflict of Interest Code requires most other public officials to file SEIs. The Board of Supervisors adopts the Conflict of Interest Code after receiving input from each department. The City updates the Conflict of Interest Code every even-numbered year.

The Conflict of Interest Code identifies the individuals in each department who must file SEIs and specifies the filing requirements for those individuals. The Conflict of Interest Code is set forth in San Francisco Campaign and Governmental Conduct Code sections 3.1-100 – 3.1-510. Each public official should review these provisions to determine his or her disclosure obligations.

3. When must Statements of Economic Interests be filed?

Public officials who are required to file statements must file an initial "assuming office statement" within 30 days of taking office and a "leaving office statement" within 30 days of leaving office. While in office, a public official must file an "annual statement" on or before April 1 of each year. Cal. Govt. Code § 87302; 2 C.C.R. § 18730. See also 2 C.C.R. § 18732 (filing dates for officials assuming office between October 1 and December 31); § 18735 (filing dates for designated employees who change positions).

4. Where are Statements of Economic Interests filed?

Elected officials, members of boards and commissions, and department heads must file their SEIs with the Ethics Commission. Agency heads of the San Francisco Unified School District, the Community College District, the San Francisco Housing Authority, the Successor Agency to the Redevelopment Agency of the City and County of San Francisco, , and the Law Library

also file with the Ethics Commission. Designated employees must file their forms with their department's filing officer. See C&GC Code § 3.1-103.

Financial disclosure forms may be obtained from the San Francisco Ethics Commission or downloaded from the FPPC's website at <http://www.fppc.ca.gov>. The Ethics Commission and the FPPC provide assistance in completing the forms. The Ethics Commission's telephone number is (415) 252-3100 and the FPPC's telephone number is (866) 275-3772. In addition, the City Attorney's Office will assist with questions regarding completion of the forms. The telephone number for the City Attorney's Office is (415) 554-4700.

5. What are the consequences of not filing the Statement of Economic Interests or not disclosing required information?

Failure to comply with these reporting requirements may result in fines, discipline, and civil or criminal proceedings. In addition, there is a \$10 a day fine (up to a maximum of \$100) for late filings. Local law also provides that an officer or employee may be subject to discipline or removal from office for failure to file. See Cal. Govt. Code § 91000, et seq.; C&GC Code § 3.1-102.5(a).

Additionally, a member of a City board or commission who has failed to file a timely SEI—or a Sunshine Ordinance Declaration or a Certificate of Ethics Training—is disqualified from participating in or voting on matters on the board or commission's meeting agenda until the board member or commissioner subsequently files the SEI. C&GC Code § 3.1-102.5(c). And the secretary of the board or commission must make an announcement at the beginning of each meeting informing the public that the board member or commissioner has not filed an SEI and is disqualified from participating and voting. C&GC Code § 3.1-102.5(d). The Ethics Commission's Executive Director may waive the disqualification requirement for cause. C&GC Code § 3.1-102.5(c)(1).

6. May officials amend their Statements of Economic Interests?

If an official discovers an error after filing a SEI, the official must amend that filing. SEI amendment forms are available on the FPPC's website at <http://www.fppc.ca.gov>.

7. Who has access to Statements of Economic Interests?

SEIs are public records. Any member of the public may review and copy a public official's SEI. Cal. Govt. Code § 81008. In addition, any member of the public may access the Form 700s filed with the Ethics Commission through its website at sfethics.org.

8. Sunshine affidavit required for officials who file SEIs with the Ethics Commission

Each official who files an SEI with the Ethics Commission must also file an annual affidavit with the Ethics Commission stating that the official has completed Sunshine training

required by the Sunshine Ordinance and ethics training required by state law. The Ethics Commission provides forms for this purpose at their office and on their website. For further information about this requirement, see the Section IV(F) of Part One in this Guide. See Admin. Code § 67.33; EC Regs. 67.33-1, 15.102-1.

C. Conflicts of interest under the Political Reform Act based on solicitation and receipt of campaign contributions by department heads and members of appointed boards and commissions

California Government Code section 84308 prohibits department heads and members of appointed boards and commissions from soliciting contributions in excess of \$250 from persons who are parties to, or participants in, proceedings pending before them, and from making decisions affecting a source of campaign contributions of more than \$250.

1. Who is covered?

Section 84308 applies to department heads and appointed boards and commissions. Although the section does not apply to elected bodies such as the Board of Supervisors, when members of an elected body are sitting as members of an appointed body, they are subject to section 84308. But if the *entire* body is made up of elected officials, as for example, where the Board of Supervisors is designated to sit as the Transportation Authority, section 84308 does not apply. 2 C.C.R. § 18438.1.

2. What does section 84308 prohibit?

Section 84308 prohibits two types of activities: soliciting contributions above \$250 from participants in proceedings before the official, and participating in decisions involving certain contributors.

a. Ban on soliciting contributions greater than \$250

Section 84308 prohibits an appointed officer from soliciting, accepting or directing campaign contributions of more than \$250 from any party, participant or agent of a party or participant:

- while a proceeding is pending before the officer's agency; and
- for three months following the date of the decision.

This prohibition applies even where the contribution is directed to a person other than the officer. Similarly, a party, participant or an agent cannot make a campaign contribution of more than \$250 to an officer during the course of the proceedings and for three months following the decision.

An officer "solicits" a contribution only if the officer knows or has reason to know that the person being solicited is a party or participant (or the agent of either) and personally requests the contribution or knowingly allows an agent to do so. A prohibited solicitation

under section 84308 does not include a request made in a mass mailing to the public, at a public gathering, or in a newspaper or other mass media.

b. Disqualification

Section 84308 prohibits an officer from participating in a decision when before making the decision, the officer learns that a party or participant in a proceeding has made a campaign contribution of more than \$250 to the officer within the previous 12 months. If the officer returns the contribution (or the portion of the contribution over \$250) within 30 days of the time that he or she learns of the contribution and the proceeding, then disqualification is not required.

Unlike the prohibition on soliciting contributions, the disqualification requirement applies only if the contribution was made to the officer. Disqualification is not required if the officer solicited contributions for other people.

An officer who has received a campaign contribution of \$250 or more within the previous 12 months from a party or participant in a proceeding (or their agents) must disclose that fact on the record of the proceeding. The party who made a contribution to an officer in the 12 months before the decision also has a duty to disclose the contribution.

3. What is a proceeding?

A proceeding is an action to grant, deny, revoke, restrict, or modify any license, permit, or other entitlement for use. A proceeding includes action on all business, profession, trade and land use licenses and permits. It also includes agency decisions regarding contracts (other than competitively bid, labor, or personal employment contracts) and all franchises. The exception for “competitively bid” contracts applies only when the bidders submit fixed amounts in their bids and the agency is required to select the lowest qualified bidder. FPPC Adv. Ltr. No. I-93-220.

A proceeding does not include action on rules of general application, such as adoption of a general plan or real estate development standards. 2 C.C.R. § 18438.2(a).

4. When is a proceeding pending before an agency?

A proceeding is pending before an agency when:

- the proceeding has commenced;
- officers of the agency will make a decision in the matter; and
- the officers’ decision will not be purely ministerial. 2 C.C.R. § 18438.2.

A proceeding commences when an application is filed, an agency begins to prepare a request for proposals for a contract, or an issue is otherwise submitted to the jurisdiction of an agency for a decision. 2 C.C.R. § 18438.2; FPPC Adv. Ltr. No. A-96-083.

Section 84308 applies only when an officer knows or has reason to know that a proceeding is pending. 2 C.C.R. § 18438.7; FPPC Adv. Ltr. No. A-96-083. For instance, if agency staff is working on a proceeding, the proceeding is pending but the agency commissioners are not

aware of the proceeding, the prohibitions of section 84308 do not apply until the officers receive notice, such as an agenda listing the proceeding. See *id.*

5. Who is a party, participant or agent?

A party is a person who files an application for, or is the subject of a proceeding, involving a license, permit, or other entitlement for use. A party also includes a party to a contract (other than a competitively bid, labor or personal employment contract) that requires the agency's approval. A participant is any person who is not an actual party to the proceeding but who actively supports or opposes a particular decision by lobbying the agency, testifying, or otherwise seeking to influence the agency and who has a financial interest in the outcome of the decision. An agent is an individual or firm who represents a party or participant in the proceeding. 2 C.C.R. §§ 18438.3; 18438.4.

D. Conflicts of interest under Government Code section 1090

California Government Code Section 1090 prohibits public officials, employees and consultants from participating in the making of a contract that could implicate their personal financial interests. The prohibition extends to contracts approved by individual public officials and employees, or by the boards or commissions of which they are members. Employees, consultants, and members of purely advisory bodies who are financially interested in a contract must abstain from participating in the making of the contract. For public officials, such as members of City boards and commissions, abstaining from a decision may not adequately address a conflict of interest under Government Code Section 1090. A conflict of interest under Government Code Section 1090 may require that a public official choose between maintaining a private interest and remaining in public office. Contracts violating Section 1090 are void and violation of this section may subject a public official to severe sanctions, including possible criminal liability.

As we further describe below, there are narrow exceptions to Section 1090. Officials should consult in advance with the City Attorney's Office to confirm whether one of these exceptions applies and if not, what steps they should take to address the potential conflict.

1. Who is subject to Government Code section 1090?

Section 1090 applies primarily to City employees and officials. But section 1090 also applies in some situations to consultants and contractors that work for City agencies and departments. If a City consultant or contractor's duties include engaging in or advising on public contracting for a City agency, then that contractor is subject to section 1090's prohibitions. See *People v. Superior Court*, 3 Cal.5th 230, 245 (2017).

2. What is a financial interest?

Section 1090 does not define the term "financial interest." The courts have made clear that they will not construe the term "in a restrictive and technical manner." *People v. Honig*, 48

Cal. App. 4th 289 (1996). Section 1090 is “concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the [City].” *Id.* at 315.

3. What constitutes making a contract?

Section 1090 also does not define making a contract. Again, the courts have construed this term broadly to serve the statute’s purposes. Courts have held that the term extends to the planning, preliminary discussion, compromising, drawing of plans and specifications, and solicitations of bids that lead to the formal making of a contract. *Stigall v. City of Taft*, 58 Cal.2d 565, 569 (1962). The California Attorney General has stated that participation in the initial stages of making a contract can preclude a public official from seeking the same contract after leaving office. 81 Ops. Cal. Atty. Gen. 317 (1998).

4. Remote interests

Government Code section 1091 identifies several “remote interests,” or exceptions to Government Code section 1090. Remote interests are financial interests that the Legislature has deemed sufficiently remote that an official with such an interest may abstain from voting on a matter in which the official has an interest rather than resigning from the board or commission.

Remote interest exceptions may apply if the official is a landlord or tenant of the contracting party or an officer of a nonprofit corporation receiving a grant. When a public official has a “remote interest,” the official may remain on the board or commission that votes on the contract, but the member with the remote interest must announce the interest on the record and abstain from all discussions about and votes regarding the matter involving the remote interest.

5. Noninterests

Government Code Sections 1091.5 identifies “noninterests.” Noninterests involve situations that the Legislature has determined do not present a conflict of interest. If a member of a board or commission has a noninterest, section 1090 does not prohibit the official from voting on the matter involving the noninterest.

Even where Government Code Section 1090 does not preclude an official’s participation in a decision, the public official must still ensure that the Political Reform Act does not bar participation in the decision.

E. Conflicts of interest under the common law

Before the Legislature enacted California statutes on conflicts of interest, the State courts developed a common law conflict of interest doctrine. Although it is unclear whether this doctrine applies in areas governed by statute, public officials should also consider this doctrine in assessing a proposed course of conduct. Generally, the doctrine provides that a public official owes an undivided duty of loyalty to the public. Where a governmental

decision involves a conflict between a public official's duty of loyalty to the public and duty of loyalty to a private interest, the public official should avoid participating in the decision. See *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928).

F. Conflicts of interest under the Campaign and Governmental Conduct Code

1. Bribery

Campaign and Governmental Conduct Code section 3.216(a) prohibits bribery. That section prohibits any person from offering or making, and any officer or employee from accepting, any gift with the intent to influence the City officer or employee in the performance of any official act. See also Cal. Penal Code § 68.

Campaign and Governmental Conduct Code section 3.207 similarly prohibits City elected officers and members of boards and commissions from giving, offering, promising to give, withholding, or offering or promising to withhold any official vote, action, or influence in exchange for a campaign contribution. C&GC Code § 3.207(a)(2).

Section 3.207 also prohibits City elected officers and members of boards and commissions from soliciting or accepting anything of value that could reasonably be expected to influence the official's vote, official actions, or judgment with respect to a particular pending legislative or administrative action, or could reasonably be considered as a reward for any official action or inaction. C&GC Code § 3.207(a)(3). Under this ordinance, "anything of value" means any money or property, private financial advantage, service, payment, advance, forbearance, loan, or promise of future employment, but does not include City salary or compensation, campaign contributions, or gifts that fall into existing gift exceptions. C&GC Code § 3.203.

2. Misuse of office

Campaign and Governmental Conduct Code section 3.207(a)(1) prohibits City elected officers and members of boards and commissions from using their public position or office to seek or obtain anything of value for the private or professional benefit of themselves, their immediate families, or any organizations with which they are associated. C&GC Code § 3.207(a)(1). An official is "associated" with an organization if the official or an immediate family member is an employee, agent, director, officer, or trustee, or owns or controls at least 10% of the equity. C&GC Code § 3.203. For example, under section 3.207(a)(1), if an elected official is on the board of directors of a nonprofit organization, the official cannot use his or her City position or title to solicit funds for that organization.

3. Appointments and nominations

Campaign and Governmental Conduct Code section 3.208 provides that no person may give or promise and no officer or employee of the City may solicit or accept, any money or anything of value in consideration for the person's, or any other person's, nomination or

appointment to any City office, employment, promotion, or for other favorable employment action.

4. Prohibition on voting on own character or conduct

Campaign and Governmental Conduct Code section 3.210 prohibits a member of a board or commission from knowingly voting on or in any way attempting to influence the outcome of governmental action involving the member's own character or conduct, own rights as a member, or own appointment to any office, position, or employment. This section does not prohibit any officer or employee from:

- responding to allegations;
- applying for an office, position, or employment;
- responding to inquiries; or
- participating in the decision of the member's board, commission, or committee to choose the member as chair, vice chair, or other officer of the board, commission, or committee.

5. Decisions involving family members

In addition to the general prohibitions on making decisions in which a public official has a financial interest, section 3.212 of the Campaign and Governmental Conduct Code prohibits officers and employees of the City from making, participating in making, or seeking to influence a City decision about an employment action involving a relative.

Nothing in this section prohibits an officer or employee from acting as a personal reference or providing a letter of reference for a relative who is seeking appointment to a position in any City department, board, commission, or agency other than the officer or employee's department, board, commission, or agency under the control of any such department, board, commission, or agency.

When this section prohibits a department head from participating in an employment action involving a relative, the department head must delegate in writing to an employee in the department the authority to make any decisions regarding such employment action.

For purposes of this prohibition, the term "employment action" means hiring, promotion, or discipline. C&GC Code § 3.212(c). The section does not apply to an appointment or other decisions related to holding a City office or position that is nonsalaried. See EC Reg. 3.212-1. The term "relative" means a spouse, registered domestic partner, parent, grandparent, child, sibling, parent-in-law, aunt, uncle, niece, nephew, or first cousin and includes any similar step relationship or relationship created by adoption. C&GC Code § 3.212(c).

6. Disclosure of personal, professional and business relationships

Section 3.214 of the Campaign and Governmental Conduct Code requires City officers and employees to disclose on the public record any personal, professional, or business relationship with any individual who is the subject of, or has an ownership or financial interest in, the subject of a governmental decision being made by the officer or employee. This disclosure requirement applies only if, as a result of the relationship, the public could reasonably question the ability of the officer or employee to act for the benefit of the public. Disclosure on the public record means inclusion in the minutes of a public meeting, or if the decision is not made at a public meeting, recorded in a memorandum kept on file at the offices of the City officer or employee's department, board, or commission.

The Ethics Commission has adopted regulations detailing the types of personal, professional, and business relationships that this section requires to be disclosed. See EC Regs. 3.214-1 to 3.214-6. The regulations define personal, professional, or business relationships as follows:

- **Personal relationship.** A personal relationship is a relationship involving a family member or a personal friend, but does not include a mere acquaintance.
- **Professional relationship.** A professional relationship is a relationship with a person based on regular contact in a professional capacity, including regular contact in conducting volunteer and charitable activities.
- **Business relationship.** An officer has a business relationship with a person if, within the two years before the decision, the person was a client, business partner, colleague, or did business with the officer or employee's business. A business relationship does not include a person with whom the officer or employee does business in a personal capacity, such as a grocery store owner. EC Reg. 3.214-5.

EC Reg. 3.214-5. A court may void any governmental decision made by a City officer or employee who fails to make the disclosure required by this section if the failure to disclose was willful and the City officer or employee failed to make the decision (1) with disinterested skill, zeal and diligence, and (2) primarily for the benefit of the City. Other than discipline by an appointing authority, no penalty may be imposed for a violation of this section.

7. Receipt of benefits for referrals

Section 3.226(a) of the Campaign and Governmental Conduct Code prohibits an officer or employee from receiving any money, gift, or other thing of economic value from a person or entity other than the City for referring a member of the public to a person or entity for any advice, service, or product related to the City's processes.

8. Restrictions on contracting

Campaign and Governmental Conduct Code section 3.226(b) prohibits an officer or employee from requiring a member of the public to hire, employ, or contract with any specific person or entity in exchange for any governmental action. For example, this

provision would prohibit a department from requiring a contractor to hire a particular person or subcontractor as a condition of a contract award. Departments that wish to hire a particular person or subcontractor due to that person's or subcontractor's expertise or familiarity with the work to be conducted, should consult in advance with the City Attorney's Office. Section 3.226(b) does not prohibit a City department, board, commission, or agency from requiring a prime contractor to use subcontractors listed in the prime contractor's proposal or bid. See EC Reg. 3.226-1.

Section 3.226(b) also provides that the Ethics Commission may waive this restriction if the Commission determines that hiring or contracting with a particular person or entity is necessary for the proper administration of a governmental program or action. See EC Reg. 3.226-1.

G. Recusal requirements for board members and commissioners with conflicts of interest

When a member of a board or commission has a conflict of interest under either the Political Reform Act, Government Code section 1090, Government Code section 84308, or Campaign and Governmental Conduct Code section 3.207, the board member or commissioner must abstain from the decision-making process. Additionally, at any public meeting where a board or commission discusses an item for which a board member or commissioner has a conflict of interest, that board member or commissioner must (1) publicly identify the circumstances requiring recusal from the matter and (2) leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter is on the board or commission's consent calendar. C&GC Code § 3.209(a). The exception for consent calendar items does not apply to members of the Board of Supervisors, members of the Planning Commission, members of the Retirement Board, the Mayor, the City Attorney, the District Attorney, the Treasurer, and other City officials who manage public investments if they have a conflict of interest under the Political Reform Act. Cal. Govt. Code § 87105; 2 C.C.R. § 18707.

Members of City boards and commissions who file Form 700s electronically with the Ethics Commission also must file a notification with the Ethics Commission each time the board member or commissioner recuses from a matter because of a conflict of interest under the Political Reform Act, Government Code section 1090, Government Code section 84308, or Campaign and Governmental Conduct Code section 3.207. C&GC Code § 3.209(b). The official must file the recusal notification within 15 days after the meeting at which the recusal occurred, even if the official was not present at the meeting that would have involved the conflict of interest. *Id.*

III. Other prohibitions

Public officials are subject to a number of other state and local laws governing official conduct that restrict conflicts between outside activities and public duties. The following is a brief description of the provisions of these laws that most frequently apply.

A. Prohibition on representing private parties before other city officers and employees: compensated advocacy

Section 3.224 of the Campaign and Governmental Conduct Code prohibits any officer of the City from directly or indirectly receiving any compensation to communicate orally, in writing, or in any other manner on behalf of any other person with any other officer or employee of the City with the intent to influence a government decision.

This section does not apply to any communication by:

- an officer of the City on the City's behalf;
- an officer of the City on behalf of a business, union, or organization of which the officer is a member or full-time employee;
- an associate, partner, or employee of an officer of the City unless it is clear from the totality of the circumstances that the associate, partner or employee is merely acting as an agent of the City officer; or
- a City officer acting in a capacity as a licensed attorney engaged in the practice of law.

Intent to influence means any communication made for the purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing a governmental decision, but does not include communications that:

- involve only routine requests for information, such as a request for publicly available documents;
- are made as a panelist or speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- are made while attending a general informational meeting, seminar, or similar event;
- are made to the press; or
- involve an action that is solely ministerial, secretarial, manual or clerical. EC Reg. 3.224-1.

The Ethics Commission may waive the prohibitions in this section for any member of a City board or commission who by law must be appointed to represent any profession, trade, business, union, or association.

B. Restrictions on future employment

As described below, several City laws limit the employment activities of officers or employees after they leave City service:

- All City officers and employees are permanently barred from switching sides on a particular matter that they were personally and substantially involved in while in City service.
- For one year after leaving City service, officers and employees may not seek to influence their former department or other government unit.
- City officers and employees may not accept employment with certain City contractors for one year.
- The Mayor and members of the Board of Supervisors are subject to broader post-employment restrictions than those that apply to other City officers and employees.

Individuals subject to these rules may request waivers from the Ethics Commission under some circumstances.

1. All officers and employees

All City officers and employees are subject to a permanent ban on certain types of post-employment activities, and a one-year ban on activities related to lobbying their former department.

a. Permanent ban

The permanent ban on certain post-employment activities is similar to the State law that applies to State officers and employees. Under section 3.234(a)(1)(A) of the Campaign and Governmental Conduct Code, City officers and employees may never act as an agent, attorney, or otherwise represent any person, other than the City, before any court or before any state, federal or local agency (or any officer or employee of such a court or agency) by making any formal or informal appearance or by making any oral, written or other communication in connection with a particular matter if:

- 1) the City is a party or has a direct and substantial interest in the matter;
- 2) the former officer or employee participated personally and substantially as a City officer or employee in the matter; and
- 3) the matter involved a specific party or parties at the time of the officer or employee's participation.

Section 3.234(a)(1)(B) imposes a permanent ban on aiding, advising, counseling, consulting, or assisting another person (other than the City) in any proceeding in which the officer or employee would be precluded from participating personally.

The permanent ban does not apply to offering witness testimony in court or other legal proceedings, provided that the officer or employee is not testifying as an expert witness and

receives no compensation other than fees regularly provided for by law or regulation to witnesses. C&GC Code § 3.234(a)(1)(C).

b. One-year ban on communications

In addition to the permanent ban, no current or former City officers and employees may, for one year after terminating their City service or employment with a City department, board, or commission, communicate with an intent to influence a government decision, orally, in writing, or in any other manner, on behalf of any other person (except the City), with any officer or employee of the department, board, or commission that the officer or employee served. C&GC Code § 3.234(a)(1)(D). This prohibition does not apply to a current or former City officer acting in a capacity as a licensed attorney engaged in the practice of law.

For former Mayors, former members of the Board of Supervisors, and their senior staff members, the one-year ban prohibits communications on behalf of others with any City agency and department. C&GC Code § 3.234(b)(1). The prohibition extends to communications with City officers, employees and representatives as well as City boards, departments, commissions and agencies.

c. Waiver

The Ethics Commission may waive the application of a post-employment restriction to a current or former employee or officer if the Commission determines that granting a waiver would not create the potential for undue influence or unfair advantage. The Ethics Commission may also waive any of these restrictions for members of City boards and commissions who, by law, must be appointed to represent any profession, trade, business, union, or association. C&GC Code § 3.234(c).

Ethics Commission regulations implement this waiver provision and explain the waiver process. See EC Reg. 3.234-4.

d. Future employment

There are two additional limits on future employment that apply to City officers and employees:

- a one-year ban on employment with certain City contractors; and
- a prohibition on making decisions affecting a person or entity with whom the officer or employee is discussing or negotiating future employment.

i. One year ban on employment with certain City contractors

Under Campaign and Governmental Conduct Code section 3.234(a)(3), City officers and employees may not work for or otherwise receive compensation from a person or entity that entered into a contract with the City within the previous 12 months if the officer or employee personally and substantially participated in the contract award.

The Ethics Commission may waive this prohibition if the Commission determines that imposing the restriction would cause extreme hardship for the former City officer or

employee. Ethics Commission regulations implement this provision and explain the waiver process. See EC Reg. 3.234-4.

ii. **Making decisions affecting a person with whom a City employee or official is negotiating future employment**

Under both the Political Reform Act (Cal. Govt. Code § 87407) and Campaign and Governmental Conduct Code (section 3.206(c)), City employees may not make, participate in making, or seek to influence a government decision affecting a person or entity with whom the employee is discussing or negotiating future employment.

2. Future city employment for former Mayors and members of the Board of Supervisors

Neither the Mayor nor a member of the Board of Supervisors may, for a period of one year after the last day of service as Mayor or member of the Board of Supervisors, be appointed to any full-time, compensated employment with the City. C&GC Code § 3.234(b)(2).

This restriction on appointment to “employment” does not apply to the appointment of a former Mayor or Supervisor to a vacancy in an elective office of the City and County, or to a seat on a board or commission in the executive branch.

C. Prohibition on incompatible activities

1. Statements of incompatible activities

Government Code section 1126 prohibits City officials from engaging in compensated activities that are incompatible with their official duties. Campaign and Governmental Conduct Code section 3.218 implements this provision. Under this local law, City officers and employees may not engage in any employment, activity or enterprise that their department, board, commission or agency (“department”) has identified as incompatible. Each department has listed its incompatible activities in its statement of incompatible activities (“SIA”).

The SIAs are specific to the duties and responsibilities of each department’s officers and employees. Although all SIAs include several of the same rules, no SIA is exactly like another, and City employees and officials should consult their own department’s SIA. All SIAs are on the Ethics Commission’s website, sfethics.org.

The SIAs supersede pre-existing Civil Service Commission rules and regulations relating to outside activities. C&GC Code § 3.218(f).

2. Common provisions of SIAs

Each department’s SIA must list those activities that are inconsistent, incompatible, or in conflict with the particular duties of the officers and employees of the department. The

incompatible activities vary from department to department, but all SIAs prohibit the following:

- using the time, facilities, equipment and supplies of the City or the badge, uniform, prestige or influence of the City officer or employee's position for private gain or advantage;
- receiving or accepting anything of value from anyone other than the City for the performance of an act that the officer or employee would be required or expected to render in the regular course of service or employment with the City;
- performing an act in a capacity other than as an officer or employee of the City that may be subject directly or indirectly to the control, inspection, review, audit, or enforcement of the officer or employee's department, board, commission or agency; and
- participating in an activity with time demands that would render the performance of the City officer and employee's duties less efficient.

3. Notice to officers and employees

By April 1 of each year, every department must provide its employees and officers with a copy of its SIA. EC Reg. 3.218-2. Each department must provide a copy of its SIA by taking all of the following steps:

- posting the SIA on the department's web page;
- posting the SIA within the department's offices in the same place that other legal notices are posted; and
- either distributing a paper copy of the SIA to each officer or employee, or distributing an electronic copy of the SIA to each officer or employee by either (a) sending an email that contains the SIA to each officer or employee, or (b) if the department does not have the officer or employee's email address, by providing a handout to the officer or employee that references the SIA, provides the address of the SIA on the website of the department or the Ethics Commission, and directs the officer or employee to review the SIA in its entirety. EC Reg. 3.218-2.

4. Advance written determinations

An employee or officer may request a determination that the otherwise incompatible activity that the employee or officer wishes to perform should not be prohibited in a particular circumstance. An advance written determination confers the employee or officer seeking the determination with immunity from any subsequent enforcement action based on an alleged violation of the SIA.

The employee or officer seeking an advance written determination (the "requester") must submit the request in writing. Departments may develop or use their own forms for advance written determination requests. The Ethics Commission has also developed a standard request form, which is available on its website.

Each department's SIA identifies the decision-maker for advance written determinations. The decision-maker is the person or group of people who decide whether the proposed activity is incompatible with official duties and responsibilities. EC Reg. 3.218-4(b). The identity of the appropriate decision-maker can vary depending on who is seeking the advance written determination. The decision-maker must, on the basis of the facts and information provided by the requester, determine whether the activity that the requester wishes to perform is incompatible with the requester's duties. EC Reg. 3.218-4(c).

If an employee requests an advance written determination and the decision-maker does not make a decision within 20 days, the advance written determination is automatically approved. EC Reg. 3.218-4(d). This 20-day deadline does not apply to requests by officers.

If the circumstances described in the requester's application for an advance written determination are either inaccurate or change over time, the decision-maker may revoke any prior approval of an advance written determination. EC Reg. 3.218-4(d).

All requests for advance written determinations, and the advance written determinations themselves, are public records.

5. Amendment of statements of incompatible activities

A department may submit proposed amendments to its SIA to the Ethics Commission. EC Reg. 3.218-1. No such amendments will be effective until the Ethics Commission has approved them. The Ethics Commission may also, at any time and on its own initiative, amend any department's SIA.

D. Holding more than one office

1. Dual office-holding for compensation

Under Campaign and Governmental Conduct Code section 3.220, City officers with an annual salary of more than \$2,500 may not hold any other local, state or federal office with an equal or greater salary. The term "salary" does not include a stipend, per diem, or other payment for attendance at meetings; health, dental, or vision insurance; or other non-cash benefits. A person who violates this provision is deemed to have vacated the City office.

2. Incompatible offices

Under Government Code section 1099, public officials may not hold incompatible offices. In the absence of statutes indicating otherwise, offices are incompatible if the duties of the two offices will result in a significant clash of loyalties, if the dual office holding would be improper for reasons of public policy, or if either office exercises a supervisory, auditory, or removal power over the other. *People ex rel. Chapman v. Rapsey*, 16 Cal.2d 636 (1940). Upon assuming an incompatible office, a person is deemed to have vacated the first office.

E. Prohibition on contracting with the city

Section 3.222 of the San Francisco Campaign and Governmental Conduct Code prohibits City officers from contracting with the City, the School District, the Redevelopment Agency, the Housing Authority or the Community College District. This provision applies to any contract or subcontract of \$10,000 or more per year.

This prohibition does not apply to:

- contracts or subcontracts with nonprofit organizations, or to contracts or subcontracts entered into before a member of a board or commission began service;
- agreements to provide goods or services at substantially below fair market value; or
- contracts or subcontracts with business entities affiliated with a member of a board or commission unless the official exercises management and control over the business.

The Ethics Commission may waive the prohibition for any officer who, by law, must be appointed to represent any profession, trade, business, union or association.

F. Prohibition on disclosing or using confidential information

Campaign and Governmental Conduct Code section 3.228 prohibits City officers and employees from disclosing any confidential or privileged information unless authorized or required by law to do so.

Officers and employees are also prohibited from using any privileged information obtained by virtue of their office or employment to advance the financial or other private interests of themselves or others.

Under this section, confidential information means information that at the time of use or disclosure was not subject to disclosure under the Sunshine Ordinance or California Public Records Act.

G. Restrictions on use of city resources

State law prohibits officers and employees from using public resources for campaign activity, personal purposes, or other purposes not authorized by law. Cal. Penal Code § 424; Cal. Govt. Code § 8314; *Vargas v. City of Salinas*, 46 Cal.4th 1 (2009); *Stanson v. Mott*, 17 Cal.3d 206 (1970). Misuse of public resources may be punishable by two to four years imprisonment in State prison and disqualification from holding any public office in the State, as well as civil penalties. Incidental and minimal use of public resources is not subject to criminal prosecution. Cal. Govt. Code § 8314(e); Cal. Penal Code § 424(c).

Local law specifically prohibits use of public funds to design, produce, create, mail, send, or deliver any printed greeting card that celebrates or recognizes a holiday. C&GC Code § 3.232. Also, each City department's statement of incompatible activities includes language

prohibiting the use of time, facilities, equipment and supplies for personal or political activities.

H. Restrictions on political activity

1. Use of city resources

In addition to the general restriction on the improper use of public resources, State and local law impose specific restrictions on political activity. California Government Code section 54964 prohibits local agencies from expending public funds to support or oppose a candidate or ballot measure.

Officers and employees may not engage in political activity during working hours or on City premises. C&GC Code § 3.230(c). For purposes of this prohibition, the term “City premises” does not include property that is made available to the public and can be used for political purposes.

Officers and employees may not participate in political activities of any kind while in uniform. Cal. Govt. Code § 3206; C&GC Code § 3.230(b); see also EC Reg. 3.230-1(a) (defining “in uniform”).

2. Soliciting campaign contributions and volunteers

State and local law prohibit City officers and employees from directly or indirectly soliciting funds from other officers or employees of the City or from persons on the City’s employment lists, unless the solicitation is part of a solicitation made to a significant segment of the public that may include officers or employees of the City. Cal. Govt. Code § 3205; C&GC Code § 3.230(a).

Elected officials and members of boards and commissions also may not request that any subordinate employee volunteer for any campaign for or against any ballot measure or candidate. C&GC Code § 3.231(a).

3. Fundraising

A member of a board or commission (other than the Board of Supervisors) may not fundraise for (1) his or her appointing authority’s election campaign if the board member or commissioner was appointed by a City elective officer; (2) any candidate for the office held by the appointing authority; or (3) any political committee controlled by the appointing authority. C&GC Code § 3.231(b). For these purposes, a commissioner’s appointing authority is the official who currently holds the office with the authority to make appointments. For example, for a member of the Planning Commission who was appointed by a past Mayor, the commissioner’s “appointing authority” is the current Mayor.

For more information about this topic, consult the City Attorney’s most recent memorandum on “Political Activity by City Officers and Employees.” The current version of the memorandum may be found on the City Attorney’s Legal Opinions webpage.

4. Board members and commissioners running for elective office

Appointed members of boards, commissions and other decision-making bodies established by the City's Charter may not run for State or local elective office during their tenures. S.F. Charter § 4.101.1. Those officials immediately lose their appointed positions upon filing a declaration of candidacy for any State elective office, any City elective office, Board of Education, Governing Board of the Community College District, or Bay Area Rapid Transit Board of Directors. *Id.*

I. Contractor contribution ban

1. Ban on contributions from contractors to elected officials or candidates

Under San Francisco's Campaign and Governmental Conduct Code, a person who contracts with the City, the San Francisco Unified School District, the Community College District, or a state agency with members appointed by the Mayor or the Board of Supervisors may not make a campaign contribution to any elected officer whose office, board or appointees would have to approve any such contract. C&GC Code § 1.126.

The law also prohibits contributions to political committees controlled by the elected officer or to a candidate for the elected officer's position. C&GC Code § 1.126(b)(1). The law only prohibits such contributions if the contract has a value of \$100,000 or more, or a combination of contracts in one fiscal year has a value of \$100,000 or more. C&GC Code § 1.126(b)(2). The prohibition applies not only to any party and prospective party to such a contract, but also to members of the party's board of directors; its chairperson, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in the party; any subcontractor listed in a bid or contract; and any committee sponsored or controlled by the party. C&GC Code § 1.126(c).

The ban on contributions applies only during the period starting with "commencement of negotiations" and ending 12 months after the approval of the contract or upon the "termination" of contract negotiations. C&GC Code § 1.126(b)(3).

Negotiations are "commenced" when a prospective contractor "first communicates" with the City office "about the possibility of obtaining a specific contract." EC Reg. 1.126-1(a). This initial communication may occur in person, by telephone, or in writing, and may be initiated by the prospective contractor or the City officer or employee. *Id.*

Examples of communications between prospective contractors and City officers and employees that commence negotiations include, but are not limited to, the following:

- A prospective contractor contacts a City officer or employee to promote itself for a specific contract; and
- A City officer or employee contacts a prospective contractor to propose that the contractor apply for a specific contract; and a prospective contractor submits a bid,

proposal, or response to a Request for Qualifications to compete for a specific City contract.

Examples of communications between prospective contractors and City officers and employees that do not “commence” negotiations include, but are not limited to, the following:

- Inquiries regarding a particular contract, and requests for information or documents relating to a Request for Proposal or Request for Qualifications, provided that the inquiry or request does not involve promotion of the prospective contractor’s interest in a specific contract;
- Requests for Requests for Proposals and Requests for Qualifications;
- Attendance at an interested persons meeting that is open to the public; and
- Requests to be placed on a mailing list. EC Reg. 1.126-1(b).

Negotiations are “terminated” when the City or the prospective contractor end the negotiation process before a final City decision is made to award the contract. EC Reg. 1.126-1(i). For example, if a prospective contractor formally withdraws or is disqualified from consideration for a specific contract, the negotiations have terminated.

2. Ban on solicitation and receipt of contributions from contractors

San Francisco’s Campaign and Governmental Conduct Code also prohibits local elected officials from soliciting or accepting campaign contributions from certain City contractors. No City elected official, or political committee controlled by an elected official:

- May solicit or accept any contribution from a City contractor;
- From the submission of a contract involving the contractor to that elected official until either:
 - 1) the termination of negotiations; or
 - 2) 12 months have elapsed from the date the contract was approved.

C&GC Code § 1.126(c). Any candidate or candidate-controlled committee that receives a prohibited contribution must forfeit the contribution to the City. C&GC Code § 1.126(d).

Like the prohibition on making contributions from contractors to elected officials, the contracts that trigger the ban on soliciting or accepting contributions must have a value of \$100,000 or more in a fiscal year. C&GC Code § 1.126(c).

IV. Restrictions on gifts, honoraria, travel & loans

City officers and employees are subject to a number of laws and rules restricting the receipt of gifts and requiring the reporting of gifts. In this section we describe the principal gift

requirements, which are contained in the Political Reform Act. This section also describes local gift rules.

A. Gifts to individuals

1. General

The Political Reform Act imposes gift restrictions on local elected officers and officials identified in Government Code section 87200, candidates for local elected offices, and designated employees. Designated employees are all employees who are listed in the City's Conflict of Interest Code and required to file a statement of economic interests. The City's Conflict of Interest Code can be found in Article III, Chapter 1 of the Campaign and Governmental Conduct Code. The Conflict of Interest Code designates employees and officials in each City agency and specifies the financial disclosure rules that apply to the designated employees and officials.

a. Gift limits under the California Political Reform Act

Elected officials, candidates, and officials listed in Section 87200. Local elected officers, public officials listed in Government Code section 87200 and candidates for local elective office may not accept gifts of more than \$500 from a single source in calendar year. These individuals must report gifts of \$50 or more on their statements of economic interests. The public officials listed in Government Code section 87200 include members of planning commissions, members of the Board of Supervisors, the District Attorney, the Treasurer, the City Administrator, the Mayor, the City Attorney, public officials who manage public investments, and candidates for any of these offices.

Designated employees. Employees listed in the City's Conflict of Interest Code may not accept gifts of more than \$500 in a calendar year from any source if they would be required to report income from that source on their statement of economic interests. If an employee required to report income from only specific categories of sources, gifts from other sources are not subject to the gift limit and need not be reported. Gifts of \$50 or more from a reportable source must be disclosed on the employee's statement of economic interests.

Gift limits are cumulative. The total amount of gifts that an employee or official receives from a single source in a calendar year may not exceed \$500. And if the total value of gifts received from a single source exceeds \$50, the employee or official must report all of the gifts received.

Example. An executive director of a City department is designated in the City's Conflict of Interest Code and must disclose all sources of income and gifts. A professional acquaintance takes the executive director out to lunch three times during the year, but each lunch costs only \$25. Because the total for all the lunches exceeds \$50, the executive director must report all three lunches on his statement of economic interests.

b. What is a gift?

A gift is *any* payment or benefit that a public official receives or accepts for which the official does not provide goods or services of equal or greater value. A gift includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to all members of the general public. Cal. Govt. Code § 82028(a). Unless such a payment, benefit or discount falls into one of the exceptions described below, it should be considered a gift subject to limits and reporting requirements.

An official has “received” or “accepted” a gift when the official has actual possession of the gift or when the official exercises discretion or control over the gift, including discarding the gift or giving it to someone else.

If an official receives a gift and take one of the following steps within 30 days of receiving the gift, the official does not need to report the gift or account for any potential gift limits:

- Return the gift unused;
- Donate the gift, unused, to a 501(c)(3) nonprofit organization with which the official, or a member of the official’s immediate family, holds no position, or to a government agency and do not take a tax deduction for the donation; or
- Pay fair market value for the gift. 2 C.C.R. § 18941(c).

c. Exceptions

The Political Reform Act contains a number of exceptions to the broad definition of gift. 2 C.C.R. § 18942. The following are not considered gifts under the Act:

- Informational material. Informational material provided to assist an official in the performance official duties, including books, reports, pamphlets, calendars, periodicals, photographs, audio and video recordings, or free or discounted admission to conferences or seminars. Transportation provided to or in connection with an on-site demonstration, tour, or inspection also qualifies as informational material if the transportation is integral to the information conveyed, the site is otherwise legally inaccessible, or there is no publicly-available commercial transportation to or from the site. 2 C.C.R. § 18942.1.
- Gifts from family members. Gifts from an official’s spouse or former spouse, including an official’s registered domestic partner, child or step-child, parent, grandparent, grandchild, brother, sister, current or former parent-in-law, brother-in-law, sister-in-law, aunt, uncle, niece, nephew, grand-aunt, grand-uncle, grand-niece, grand-nephew, first cousin, first cousin once removed or the spouse or former spouse of any such person (other than a former in-law), provided that they are not acting as an intermediary for someone else.
- Campaign contributions. Campaign contributions are not gifts under the Act, but are subject to other state and local reporting and regulatory requirements.
- Bequest or inheritance. A bequest or inheritance is not a gift, but if an official receive tangible items as part of a bequest, such as property or stock, an official may have to report these items as investments.

- Personalized plaques and trophies worth less than \$250.
- Gifts of home hospitality. Gifts of home hospitality provided in the host's home when the host is present, including food, drink, or occasional lodging, from a person with whom the official has a relationship, connection, or association unrelated to the official's position, unless:
 - any part of the cost of the hospitality is paid directly or reimbursed by another person;
 - the host or any other person deducts any part of the cost of the hospitality as a business expense on a tax return; or
 - there is an arrangement between the host and a third party under which the host will use compensation received from the third party to pay for the hospitality.
- Gifts exchanged on birthdays and holidays. Gifts of approximately equal value exchanged between an official and another individual on holidays, birthdays, or similar occasions when gifts are typically exchanged. Similarly, if a group of City employees participate in a gift exchange – such as during the holiday season – any items received are not gifts as long as they are not substantially disproportionate in value.
- Reciprocal exchanges. Exchanges made in a social relationship between an official and another individual, with whom the official participates in repeated social events or activities such as lunches, dinners, rounds of golf, and attendance at entertainment or sporting events, where the participants typically rotate payments of less than \$500 on a regular basis so that, over time, each participant pays for approximately that person's share of the costs. But even in the context of such a social relationship, if the official has received a disproportionate amount relative to what the official has paid, that excess amount constitutes a gift.
- Donation of leave credits from colleagues. Leave credits, including vacation, sick leave, or compensatory time off, donated to an official in accordance with the City's catastrophic illness program.
- Payments received in connection with making a presentation. Admission fees, food, and nominal items provided as part of paid admission to an event, when the official is making a speech at the event and receives these payments as a result of that appearance.
- Tickets to events to perform a ceremonial role. Tickets provided to an official and one guest of the official to a facility, even, show, or performance where the official performs a ceremonial role on behalf of the City. A ceremonial role is an act performed at an event at the request of the holder of the event where, for a period of time, the focus of the event is on an act performed by the official, such as throwing out the first pitch at a baseball game, cutting a ribbon at an opening, or making a presentation of a proclamation or award. 2 C.C.R. § 18942.3. Mere attendance does not qualify as performing a ceremonial role.

- Prize or award. A prize or award received in a bona fide competition unrelated to one's official status is not a gift. But the official must report it as income if the value of the prize or award is \$500 or more.
- Wedding attendance. Benefits such as food and refreshments received as a wedding guest are not gifts so long as they are substantially the same as the benefits received by other guests.
- Bereavement offerings. Bereavement offerings typically provided in memory of and concurrent with the passing of a spouse, parent, child, sibling, or other relative of an official, such as flowers at a funeral.
- Acts of neighborliness. Acts of kindness that would be performed by a neighbor or good Samaritan, such as loaning a household item, providing a needed car ride, or assisting with a home repair. This exception does not extend to air transportation.
- Gifts given directly to members of an official's family. Gifts given directly to members of an official's family are presumed not to be gifts to the official, except when there is no established working, social, or similar relationship between the source of the gift and the official's family member, or there is evidence suggesting that the source of the gift intended to influence the official through the official's family member. 2 C.C.R. § 18943.
- Tickets to fundraisers for 501(c)(3) nonprofit organizations. If the nonprofit organization directly provides the ticket to the official, and the official uses the ticket. The official may accept up to two tickets for each event, for the official's own use and a guest. 2 C.C.R. § 18946.4(b).
- Tickets to fundraisers for political campaigns, if the candidate or committee supported by the fundraiser directly provides the ticket to the official and the official uses the ticket. The official may accept up to two tickets for each event, for the official's own use and a guest. 2 C.C.R. § 18946.4(c).
- The following exceptions may also apply so long as the individual providing the benefit or payment does not have, reasonably foreseeably have, or have within the next 12 months following the payment, any matters before the official's agency in which the official would participate. Such matters include a contract, license, permit, other entitlement for use, or an enforcement proceeding.
 - Benefits or payments made on a date or in a dating relationship.
 - Acts of human compassion. Payments provided to an official, or an official's family members, made to offset family medical or living expenses that the official can no longer meet because of an accident or illness, or to assist with expenses associated with humanitarian efforts such as the adoption of a child. Such payments do not constitute gifts so long as the source is an individual who has a prior social relationship with the official, or if the payments are made without regard to official status.

- "Best friends forever." Payments provided to an official by an individual with whom the official has a long-term, close personal friendship unrelated to the official's status.

d. Gifts that are reportable but not subject to the gift limit

The following gifts must be reported on an official's statement of economic interests, but are not subject to the gift limit.

- Wedding gifts. The law attributes one half of the gift to the public official. 2 C.C.R. § 18946.3.
- Certain gifts of travel, as discussed in Section IV(A)(4).

An official is disqualified from making a decision affecting a source of gifts of \$500 or more in the 12 months before the decision, even if the gift is not subject to the gift limit.

e. Disqualification

Regardless of whether an official files a Statement of Economic Interests, City employees and officers may not make, participate in making, or seek to influence any governmental decision affecting any person or entity that was a source of \$500 or more in gifts in the 12 months preceding the date of the decision. See Part Two, Section II(A).

2. Local gift restrictions

In addition to the Political Reform Act's requirements, the City has gift rules, found in sections 3.216 and 2.115 of the Campaign and Governmental Conduct Code. Departments may also impose additional gift restrictions on their officers or employees. Some of these department-specific gift rules may be found in each department's Statement of Incompatible Activities. See Section III(C).

a. Limits on gifts from a restricted source

Section 3.216(b) of the Campaign and Governmental Conduct Code provides that City officers and employees may not solicit or accept gifts from a person who the officer or employee knows or has reason to know is a restricted source.

A restricted source is:

- a person doing business with (*i.e.*, entering into a contract or performing under a contract) or seeking to do business with the department of the officer or employee; or
- any person who during the previous 12 months knowingly attempted to influence the officer or employee in any legislative or administrative action.

Ethics Commission regulations have established exceptions to this rule which allow officers and employees to receive nominal gifts from otherwise restricted sources. Under these exceptions, an officer or employee may accept non-cash gifts worth \$25 or less on up to four occasions per year from any restricted source. EC Reg. 3.216(b)-5(a). The regulations also allow officers and employees to accept from restricted sources gifts of food and drink to be

shared with coworkers. EC Reg. 3.216(b)-5(b). Other exceptions address free attendance at a widely attended conference or seminar, gifts offered by members of certain industries, and prizes awarded through the annual Combined Charities Fundraising Drive. EC Reg. 3.216(b)-5(c)-(g).

b. Gifts from subordinates

Under Section 3.216(c) of the Campaign and Governmental Conduct Code, officers and employees may not solicit or accept anything of value from any subordinate, or employee or from any candidate or applicant for a position as an employee or subordinate under them.

Ethics Commission regulations implement this section. These regulations exclude certain voluntary gifts given or received for special occasions or under other circumstances in which gifts are traditionally given or exchanged. See EC Reg. 3.216(c)-1. For example, gifts, other than cash, with an aggregate value of \$25 or less per occasion, given on occasions on which gifts are traditionally given, are not considered gifts for purposes of this section. Gifts, such as food and drink, without regard to value, to be shared in the office among employees, and personal hospitality provided at a residence that is of a type and value customarily provided by the employee to personal friends, are also not prohibited under this section.

c. Gifts from lobbyists

City officers may not accept or solicit any gifts from lobbyists for themselves or their spouses, domestic partners, or dependent children. This rule has one exception: City officers may accept gifts of food or refreshment worth \$25 or less per occasion, if the lobbyist making the gift is a 501(c)(3) nonprofit organization, the gift is offered in connection with a public event held by the organization, and the same food and refreshments are made available to all attendees at the event. C&GC Code § 2.115(a).

d. Gifts for referrals

City officers and employees may not accept anything of value for referring a member of the public to a person or entity for any advice, service, or product related to the City's processes. C&GC Code § 3.226.

3. Honoraria

a. Generally prohibited

Honoraria are payments for giving a speech, publishing an article, or attending a conference or other gathering. Local elected officials, officials listed in Government Code section 87200, and candidates for local elective office may not accept honoraria. Designated employees may not accept honoraria from any source they would be required to report on their statement of economic interests. Cal. Govt. Code § 89502.

b. Steps to take to avoid receipt

If an official receives an honorarium and takes one of the following steps within 30 days of receipt, the payment will not be treated as an honorarium and will not be subject to reporting:

- return the payment;
- deliver the payment to the City and do not claim a tax deduction; or
- have the payment made directly to a bona fide charitable, educational, civic, religious or similar tax exempt nonprofit organization, and comply with all four of the following requirements;
 - do not make the donation a condition of the speech, article or attendance;
 - do not claim a tax deduction;
 - do not be identified to the recipient; and
 - ensure that the donation has no reasonably foreseeable financial effect on the official or the official's immediate family. 2 C.C.R. §§ 18932-18933.

c. Exceptions

The Political Reform Act provides two exceptions to the ban on honoraria:

- Payment for dramatic, comedic, musical or other artistic performance and payment for publication of books, plays or screen plays.
- Income for personal services provided in connection with a bona fide business, trade or profession, such as teaching, practicing law, medicine, insurance, real estate, banking or building contracting, where the services are customarily provided in connection with the business. This exception does not apply where the predominant activity of the business, trade, or profession is making speeches.

4. Travel

a. The Political Reform Act

The Political Reform Act treats payments for travel as gifts. A payment, advance, or reimbursement for transportation and related lodging and food will be subject to the \$500 gift limit, unless one of the exceptions described below applies.

i. Travel payments made directly to City officials and employees

When offered to and accepted by a City official or employee, the following are not considered gifts and need not be reported on a statement of economic interests:

- Travel paid for by a state, local, or federal government agency for education, training, or other inter-agency programs. Such payments received from a government agency are limited to actual travel costs and related per diem expenses. 2 C.C.R. § 18950(c)(2).
- Reimbursement for travel by either a government agency or a 501(c)(3) nonprofit organization for which the official has provided equal or greater consideration. Cal. Govt. Code § 82030(b)(2).

The following types of travel are not subject to the gift limit but must be reported on an official's or employee's statement of economic interests. Unlike payments for travel that need not be reported, these payments may disqualify the public official from participating in a future decision affecting the source of the travel.

- Travel in connection with a speech given in the United States. Under this exception, employees and officials may accept transportation, necessary lodging and food (the day before, day of and day after the speech or panel), free admission, refreshments, and similar non-cash nominal benefits provided directly in connection with an event at which the employee or official gives a speech or, participates in a panel or seminar. Cal. Govt. Code § 89506(a).
- Travel provided by governments or nonprofits. Travel provided by a government agency, a foreign government, an educational institution, a 501(c)(3) nonprofit organization, or a foreign organization that substantially satisfies the requirements for 501(c)(3) tax-exempt status, as long as the travel is reasonably related to a legislative, governmental, or public policy purpose. Cal. Govt. Code § 89506(a).

The foregoing gift of travel exceptions do not apply if a third-party made a contribution to an organization directly paying for or reimbursing an official's travel with the intent of providing a gift of travel to that official. Under such circumstances, a contribution made to a third-party to fund the official's travel is treated as a gift from the contributor because the third-party is merely an intermediary or "pass-through" for the contribution. See 2 C.C.R. § 18945; *Modha Adv. Ltr.*, No. A-13-116A, 2013 WL 5934113 at *4-5 (Oct. 25, 2013). The third-party would be considered an intermediary for such a travel payment if any of the following applies:

- the contributor identifies the official as the intended recipient of the gift of travel;
- the third-party receives a contribution after the official or the official's agent solicited the contribution; or
- the third-party receives a contribution after soliciting the contribution with the understanding that the funds would be used for the sole or primary purpose of supporting an official's trip.

See 2 C.C.R. § 18945. Note that under this last scenario, the third-party would not need to specify which individual officials would receive the gift of travel. If the third-party generally identifies the recipients of a contribution as a group of governmental officials, the contributor's funding would constitute gifts of travel to those officials. See *Calof Adv. Ltr.*, No. I-10-107, 2010 WL 3066079 at *4-5 (Jul. 29, 2010).

ii. Travel payments made in conjunction with official agency business

Travel payments made in conjunction with official agency business and through a City department are not gifts to the official or employee using those funds. Such travel payments are thus not subject to any gift limits or reporting requirements. To qualify under the "official agency business" exception, an official must meet the following requirements.

- The payment is made directly to, or coordinated with, a City department.

- The payment is used for official agency business in one of the following ways:
 - the payment is made under to a contract that requires the contracting party to pay for any required government travel resulting from the City's participation in the contract;
 - the payment is made for the purpose of performing a regulatory inspection or auditing function that the City is required to perform;
 - the payment is provided by an organization providing a training to its members, and an employee or official is attending to provide the training;
 - the payment is made in connection with an educational conference and the employee or official is a named presenter at the conference;
 - the payment is made for an employee or official to receive a training directly related to the employee or official's job duties, and the donor commonly provides such trainings;
 - the payment is made for food to all attendees of a working group meeting in which the employee or official participates as a City representative;
 - the payment is made to view an operation, structure, facility or available product where the viewing would substantially enhance the employee or official's knowledge and understanding of whether to enter into a contract regarding a similar operation, structure, facility or product.
- The City selects the employee or official who will use the travel payment. But if the travel payment is for a presentation or training, the source of the payment may request the employee or official who is most qualified on the relevant subject matter.
- The travel is made under the same requirements applicable to travel made using City funds, and the employee or official is representing the City in the course and scope of the employee or official's duties. The travel expenses cannot exceed what would be reasonably paid at the City's expense.
- The travel payment must be disclosed on the FPPC Form 801, available at: <http://www.fppc.ca.gov/forms/801.pdf>. The form must be maintained as a public record. Within 30 days after the end of each quarter in which travel payments totaled \$2,500 or more, the Form 801 must be submitted to the FPPC and posted on the official's department's website in a prominent fashion. The Form 801 requires disclosure of the following information:
 - the dates of travel, and an itemized breakdown of the transportation, lodging and food costs;
 - the name of the transportation provider, the type of transportation provided, and the name of the business at which lodging was provided;
 - the location of the travel;
 - the name and address of the entity paying for the travel; and

- the purpose of the travel, department and title of the employee or official who used the payment and the name of any elected or appointed official who used the payment.

To qualify under the “official agency business” exception, elected officials, the City Administrator, members of the Planning Commission, and public officials who manage public investments may only accept gifts of travel in narrow circumstances. In addition to the requirements listed above, three other requirements apply to travel payments provided to these officials: they must directly relate to the official’s public duties; must be made for a purpose that would otherwise be paid for with the agency’s funds; and must be authorized in the same manner as travel payments made using the City’s own funds. 2 C.C.R. § 18950.1.

b. Constitutional prohibition on travel discounts for officers

Article XII, section 7 of the California Constitution prohibits public officers, but not employees, from accepting free passes or discounts from transportation companies. This prohibition does not apply to a public officer’s receipt of generally available “frequent-flyer” miles earned without regard to official status.

c. Reporting out-of-state travel by an elected official

Whenever a City elected official accepts a gift of transportation, lodging or food for any out-of-state trip paid for in part by someone other than the City, another government entity or an educational institution, the official must disclose the gift with the Ethics Commission on Form SFEC-3.216(d), available on the Ethics Commission’s website. The official must file the report with the Ethics Commission as soon as the official has accepted the gift of travel. As a practical matter, the official must file the report before leaving for the out-of-state trip. The Ethics Commission’s form requires the official to report who is paying for the trip, how much the travel costs, which City employees and lobbyists are traveling with the official, and other details. C&GC Code § 3.216(d).

5. Loans

Personal loans that elected and appointed officials receive are subject to restrictions and, in some circumstances, a personal loan that the official does not repay or repays below certain amounts, may become a gift to that official.

a. Limits on loans from agency officials, consultants and contractors

Elected officials and officials specified in Section 87200 may not receive a personal loan that exceeds \$250 from an officer, employee, member, or consultant of their government agency or an agency over which their agency exercises direction and control. In addition, such officials may not receive a personal loan that exceeds \$250 at any time from any individual or entity that has a contract with their government agency or an agency over which their agency exercises direction and control. Cal. Govt. Code §§ 87460-87462.

b. Restriction on loan terms

Elected officials may not receive a personal loan of \$500 or more unless the loan is made in writing and clearly states the terms of the loan. The loan document must include: the names of the parties to the loan agreement; the date; the principal amount of the loan; the interest rate; term of the loan; the amount of the payments; and the date or dates when payments are due. Cal. Govt. Code § 87461.

i. Exceptions

The following loans are not subject to these limits and documentation requirements:

- loans from banks or other financial institutions made in the normal course of business on terms available to members of the public without regard to official status;
- loans received by an elected officer's or candidate's campaign committee;
- loans received from a spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse of any such person, unless the official is acting as an agent or intermediary for another person not covered by this exemption; and
- loans made or offered in writing before January 1, 1998.

c. Loans as gifts

A personal loan received by any public official, including any designated employee, may become a gift subject to gift reporting and gift limitations under the following conditions:

i. Loan with defined repayment date

If the loan has a defined date or dates for repayment and the official does not make the repayment, then the loan will become a gift when the statute of limitations for filing an action for default has expired. For a loan provided pursuant to a written agreement, the statute of limitations is four years. See Cal. Civ. Proc. Code § 337.

ii. Loan without a defined repayment date

If the loan does not define a date or dates for repayment, then the loan will become a gift if it remains unpaid when one year has elapsed from the later of:

- the date the loan was made;
- the date the last payment of \$100 or more was made on the loan; or
- the date upon which the official last made payments on the loan aggregating to less than \$250 during the previous 12 months.

iii. Exceptions

The following loans will not become gifts to an official:

- a loan to an elected officer's or candidate's campaign committee;

- a loan described above on which the creditor has taken reasonable action to collect the balance due;
- a loan described above on which the creditor, based on reasonable business considerations, has not undertaken a collection action. But, except in a criminal action, the creditor has the burden of proving that it based the decision not to take a collection action on reasonable business considerations;
- a loan made to an official who has filed for bankruptcy and the loan is ultimately discharged in bankruptcy;
- a loan that would not be considered a gift, such as a loan from a family member. Cal. Govt. Code § 87462.

B. Gifts to the city

City departments, instead of individual City employee or officers, may also receive gifts. The City imposes a number of requirements on departments' acceptance of gifts. Also, departments should follow state law guidelines on acceptance of gifts to ensure that gifts to the City are not attributed to individual public officials, who are subject to gift limits.

1. Departments may accept gifts of up to \$10,000

Generally departments may accept gifts up to \$10,000 in value. Admin. Code § 10.100-305(a). Departments must promptly report all such gifts to the Controller. The Board of Supervisors must generally accept any gift valued in excess of \$10,000. Admin. Code § 10.100-305(b). Departments must report annually to the Board of Supervisors, during the first two weeks of July, regarding the receipt and disposition of any gifts received by the department in the previous fiscal year, regardless of amount. In some instance, the City has authorized a department's acceptance of a gift worth more than \$10,000 through a special fund established by the Administrative Code or specific Charter provisions.

2. Departments must report gifts over \$100

The Sunshine Ordinance requires departments to report gifts exceeding \$100 in value to carry out any City function by posting the information on the department's Web page and disclosing it in response to a public records request. Admin. Code § 67.29-6. The report must include the donor's name, address, and telephone number, the value of the gift, and any financial interest the donor has involving the City. *Id.*

Under Section 67.29-6, and unless otherwise provided in the Charter, departments must report gifts on their websites even if Board of Supervisors has accepted the gifts at a public meeting. Even though the Board's process of accepting most gifts over \$10,000 offers an opportunity for public review and input on those gifts, the Board's acceptance of a gift does not change or supersede the posting requirement in the Sunshine Ordinance.

Where the Charter vests in a department with special gift acceptance authority – as is the case with the City's three charitable trust departments – that Charter authority supersedes

any conflicting San Francisco Administrative Code requirement regarding gift acceptance, approval, and disclosure, including those described here.

While the Sunshine Ordinance requires departments to report gifts that they receive on behalf of the City, as explained above, the Sunshine Ordinance does not require departments to report personal gifts that City employees or officers receive. The Sunshine Ordinance's reporting requirement applies only to gifts that the City accepts or uses – that is, gifts that a City officer, employee or agent accepts in an official capacity on behalf of the City. As discussed above, many officers, employees and consultants must separately report gifts they receive personally, as opposed to gifts received by the City. The Sunshine Ordinance does not require a department to report on its website personal gifts that individual officers or employees report on their Statement of Economic Interests (Form 700) or on an elected official's Gifts of Travel Form (SFEC-3.216(d)).

C. Gifts to the city that benefit particular employees or officers

In narrow circumstances, a City department may accept a gift that would benefit a City official or a group of officials within the department, without violating any gift limits or rules that would otherwise apply. When a City agency or department receives a gift of goods or services that will benefit particular employees or officers rather than the department as a whole, state law imposes additional restrictions and reporting requirements. Such a gift may be considered a gift *to the City* and not to individual employees or officers, only if the following criteria are met. These requirements do not apply to gifts of travel or tickets received by a City department. Those gifts are addressed by separate regulations.

- The department uses the gift for official department business.
- The department head determines and controls the use of the gift and independently decides which officers or employees will use it. The department head may not select himself or herself as a recipient, unless the gift is a good or service that may be generally used by other department employees, such as a network printer connected to several office computers.

When a payment that benefits one or more individual employees or officers meets these criteria, the City must report the gift on the FPPC Form 801. The form requires that the department report the following information:

- a description of the gift, the date received, the intended purpose and the value of the gift;
- the name and address of the donor, and, if the donor is not an individual, a description of the business activity or nature and interests of the entity;
- if the donor has raised money from any other persons to pay for the gift, the names and amounts given by these persons; and
- the department's use of the gift and the name and title of the person using the gift.

The FPPC Form 801 is available at: <http://www.fppc.ca.gov/forms/801.pdf>. The department must complete the Form 801 for each gift it accepts and maintain the form as a public record. The department must also file the form with the department's filing officer (the person who accepts Statements of Economic Interests from department employees) within 30 days after the end of each fiscal quarter. The department must also post the Form 801 on the department's website, in a prominent fashion, within 30 days after the close of any fiscal quarter in which the department receives gifts that have a total value of \$2,500 or more. 2 C.C.R. § 18944.

If the gift does not qualify as a gift to the City under the criteria described above, then the employee or officer must abide by the limits, prohibitions, and reporting requirements that normally apply to an individual's acceptance of gifts; which we discuss at Section IV.A above.

D. "Behested payment" rule

1. Behested payment rule for elected officials

Under state law, City elected officials who solicit donations for legislative, governmental, or charitable purposes—including donations to the City from private sources—are required to report these "behested" payments. Such a donation is made at the "behest" of an elected official if it is requested, solicited, or suggested by that official, or otherwise made to a person in cooperation, consultation, coordination with, or at the consent of, the elected official. For example, if an elected official hosts a fundraiser for a nonprofit organization, donations by attendees at the fundraiser could trigger the reporting requirement. Similarly, if an elected official applies for a grant from a foundation on behalf of a City department, and the foundation awards the grant, the reporting requirement may apply.

The elected official asking for these donations must file a report with the official's department once a single source has made a behested payment of \$5,000 or more during the calendar year, and subsequent payments of any amount from that source must be reported as well. The required report, FPPC Form 803, is available on the FPPC's and the Ethics Commission's websites. The official must submit the report to the department within 30 days of the date on which the donation is made, and the department must then submit the form to the Ethics Commission within 30 days. Cal. Govt. Code §§ 82004.5, 84224.

2. Behested payment rules for all board members and commissioners

Reports by City officials: All members of City boards and commissions who file Form 700s with the Ethics Commission, even those who are not elected officials, must file behested payment reports in certain circumstances. A commissioner must report charitable contributions only if the commissioner solicits the contributions, directly or indirectly, from a party, participant, or agent of a party or participant involved in a proceeding before the commissioner's board or commission regarding administrative enforcement, a license, a permit, or other entitlement for use.

The commissioner must file a report if the party, participant, or agent donates \$1,000 or more either (a) while the proceeding is pending, (b) during the six months following the date a final decision is rendered in the proceeding, or (c) during the 12 months prior to the commencement of a proceeding. Commissioners are required to report the behested payments to the Ethics Commission within 30 days of the date of the contribution, or, if the contribution was made prior to the commencement of the proceeding, within 30 days of the date the commissioner knew or should have known that the contributor was a party, participant, or agent in the proceeding before the commissioner's board or commission. C&GC Code § 3.610. Officials are not required to report behested payments made solely in response to a public appeal distributed by television, a public online message, an email or printed material distributed to 200 or more recipients, or a speech to a group of 20 or more people. C&GC Code § 3.600.

Reports by Parties Making Behested Payments: Any interested party who makes a behested payment, or a series of behested payments in a calendar year, of \$10,000 or more, must file a disclosure report with the Ethics Commission within 30 days after the date on which the payments total \$10,000 or more. C&GC Code § 3.620(a). Whenever a City officer solicits or requests a behested payment subject to reporting, the official or the official's agent must notify the solicited person that the person might be subject to these disclosure and notice requirements. C&GC Code § 3.610(e). And any person who makes a behested payment must notify the recipient of the payment that the donor is making the payment at the behest of a City official. C&GC § 3.620(b).

Reports by Organizations Receiving Behested Payments: Anyone other than a City department who receives a behested payment over \$100,000, or a series of behested payments in a calendar year totaling over \$100,000, must file a disclosure report with the Ethics Commission within 30 days after the date on which the payments total \$100,000 or more. C&GC Code §3.630(a)(1). The recipient must also file supplemental disclosures with additional information between 12 and 13 months after that date. C&GC Code § 3.630(a)(2).

E. Gifts distributed by the city

1. Gifts of tickets and event passes

Free or discounted tickets and passes to an event, show or performance may be a gift to a City employee or official, even if provided by the City. Such tickets and passes are not considered gifts to the employee or official who actually uses them, only if one of the following circumstances apply.

a. Tickets or passes treated as income

If the City provides the tickets to the official, and the official treats the tickets as income, the tickets do not constitute gifts. 2 C.C.R. § 18944.1(a)(1). For these purposes, the official must report the tickets as income under state and federal income tax laws. The City must also report the tickets as income to the official on FPPC Form 802.

b. Distribution of tickets or passes for a public purpose

If the City provides the tickets to public officials for a public purpose, those tickets may not constitute gifts. To fall under the public purpose exception, the tickets must have been:

- received by the City under the terms of a contract for the use of public property;
- received by the City because the City controls the event; or
- purchased by the City at fair market value.

Also, all of the following additional conditions must apply:

- the original source of the tickets or passes has not identified which agency officials will use them;
- the agency determines in its own discretion which officials will use the tickets or passes;
- the agency distributes the tickets to its officials in accordance with a written, publicly available policy adopted by the agency, and the distribution serves a public purpose identified in that policy;
- the official uses the tickets only for the official, the official's immediate family members, or one guest who is not an immediate family member; and
- the agency reports the distribution of the tickets on its website on FPPC Form 802. The completed forms must be emailed to the FPPC at form802@fppc.ca.gov, within forty-five days of the tickets' distribution. 2 C.C.R. § 18944.1(b)-(d).

An official who accepts and uses tickets has the burden to establish that the tickets actually served a "public purpose." It may be harder for an official to meet this burden if, for example, the official attends multiple similar events at the same venue. In addition, the goals of rewarding public service or supporting general employee morale and retention do not qualify as a "public purpose" justifying the use of tickets by elected officials and members of the legislative or governing body of the ticket-distributing agency. See 2 C.C.R. § 18944.1(c). Thus, elected officials and members of the some commissions may not rely on these objectives as a public purpose to justify the use of tickets.

If an official accepts tickets from a City agency and does not follow these rules—for example, if the tickets do not fulfill a public purpose or if the official impermissibly transfers the tickets to others—then the tickets are gifts from the City and are subject to all the rules discussed in Section IV.A, above. To avoid these restrictions, the official may either pay fair market value for any tickets or passes, donate them to a 501(c)(3) non-profit organization or government agency, or return them before the event takes place.

2. Raffles

When the City, or one of the City's departments, holds a raffle for its employees, and the prizes awarded in the raffle were donated by a third party, the prizes are gifts subject to reporting requirements and applicable limits. In such instances, the department that organized the raffle should notify prize-winners of the source of the gift. The value of the

prize is its fair market value less any payment made by the employee to participate in the raffle. 2 C.C.R. § 18944.2.

V. Obligations of city officers and employees

In addition to their responsibilities to comply with State and local ethics laws, local law charges City officers and employees with several obligations regarding enforcement of local ethics laws.

A. Cooperating and assisting in enforcement investigations

Under section 3.240 of the Campaign and Governmental Conduct Code, in connection with an investigation by the Ethics Commission, the District Attorney, or the City Attorney of an alleged violation of local ethics laws, City officers and employees:

- must cooperate with and assist those agencies;
- may not provide false or fraudulent evidence, documents, or information to those agencies; and
- may not conceal from those agencies information that is material to an investigation.

B. Prohibition on filing false charges

Section 3.238 of the Campaign and Governmental Conduct Code prohibits all persons, including City officers and employees, from knowingly and intentionally filing with the Ethics Commission, the District Attorney, or the City Attorney any false charge alleging a violation of local ethics laws.

C. Prohibition on aiding and abetting

Section 3.236 of the Campaign and Governmental Conduct Code prohibits any person, including City officers and employees, from knowingly and intentionally providing assistance or otherwise aiding and abetting any other person in violating local ethics laws.

VI. Protection of whistleblowers

A. All persons may file a complaint

Any person may file a complaint with the City alleging that a City officer or employee has engaged in improper government activities; misused City resources; created a danger to public health or safety by failing to perform duties required by the officer or employee's City

position; or abused a City position to advance a private interest. C&GC Code § 4.105(a). Such a person is often referred to as a “whistleblower.”

Individuals may access additional information about the City’s Whistleblower Program and file complaints online by visiting the Controller’s website at: <http://www.sfcontroller.org/index.aspx?page=31>.

Also, whistleblower complainants may contact any of the following:

- the Controller (415/554-7500);
- the District Attorney (415/533-1752); or
- the City Attorney (415/554-4700).

Whistleblowers are entitled to confidentiality protections. C&GC Code § 4.120.

B. City officers and employees protected against retaliation

The City’s Whistleblower Ordinance, Campaign and Governmental Conduct Code section 4.100, *et seq.*, provides protection against any adverse employment action to City officers and employees who, in good faith, file a complaint, oral or written with the Ethics Commission, the Controller, the District Attorney or the City Attorney, or a complaint with the complainant’s department, alleging that a City officer or employee engaged in improper government activity by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee’s City position; abusing a City position to advance a private interest, or cooperating with an investigation of such complaint.

VII. Mass mailings at public expense

Under Government Code section 89001, public officials may not send newsletters or other mass mailings at public expense. A mass mailing is more than 200 substantially similar pieces of mail. Cal. Govt. Code §§ 82041.5, 89001.

A. What mass mailings are prohibited?

Under Government Code Section 89002, a mass mailing is prohibited only if all of the following four requirements are met:

1. Transmission

The item is sent or delivered by any means to the recipient at the recipient’s residence, place of employment or business, or post office box. The FPPC has interpreted the rule broadly

applying it to a range of modes of transmission, including fax and personal delivery as well as postal delivery. But the rule applies only to the transmission of materials to the locations specified in the rule – to a person’s home, office, or post office box.

2. Reference to elected officer

The item sent either:

- features an elected officer affiliated with the agency which produces or sends the mailing; or
- includes the name, officer, photograph, or other reference to an elected officer affiliated with the agency, which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

3. Paid for with public funds

A mass mailing is sent at public expense if:

- public money pays for any of the cost of distribution; or
- public money pays for costs of design, production, or printing exceeding \$50, and the officials designing, producing, or printing intend to send the item other than as permitted by the statute.

4. More than 200 pieces sent

The mass mailing rule applies only to mailings of more than 200 substantially similar items in a single calendar month. Copies that are exempt are not counted towards the 200 limit. The following materials are exempt:

- **Press releases.** A press release sent to members of the media. Cal. Govt. Code § 89002(b)(2).
- **Inter-office communications.** Materials sent in the normal course of business to other governmental entities or officers. Cal. Govt. Code § 89002(b)(3).
- **Intra-office communications.** Materials sent in the normal course of business to staff. Cal. Govt. Code § 89002(b)(4).
- **Collection or payment of funds.** Any item sent in connection with the payment or collection of funds if use of the elected official’s name, office, title, or signature “is necessary to the payment or collection of the funds.” Cal. Govt. Code § 89002(b)(5).
- **Essential to administration of program.** Any item that an agency responsible for administering a government program sends to persons subject to that program, where the mailing is essential to the functioning of the program, the item does not include the elected official’s photograph, and the elected official’s name, office, title, or signature is necessary to the functioning of the program. Cal. Govt. Code § 89002(b)(6).

- **Required by law.** Any legal notice or item sent as required by law, court order, or order adopted by an administrative agency under the Administrative Procedure Act, and in which use of the elected officer's name, office, title, or signature is necessary. Inclusion of an elected officer's name on a ballot as a candidate for elective office, and inclusion of an elected officer's name on a ballot argument, is considered necessary to such a notice or other item. Cal. Govt. Code § 89002(b)(7).
- **Directories.** A telephone directory, organization chart, or similar listing or roster which includes the names of elected officers as well as other individuals in the agency sending the mailing, where all names are the same type size, type face, and type color and no photographs are included. Cal. Govt. Code § 89002(b)(8).
- **Agendas.** An agenda or bill required to be made available to the public. Cal. Govt. Code § 89002(b)(10).
- **Materials sent in response to unsolicited requests.** A request is unsolicited if it is not requested or induced by the elected officeholder or a third party acting at the behest of the officeholder. Cal. Govt. Code § 89002(a)(4).

The following materials are exempt as well, unless the featured elected official will appear on the ballot at an election within 60 days of the mailing. Cal. Govt. Code § 89003.

- **Letterhead.** Any item in which the elected official's name appears only in the letterhead or logotype of the stationery, forms (including "compliments of" cards), or envelopes. Such an item may not include the elected official's picture, signature, or any other reference to the elected official, except as permitted by another exception. Cal. Govt. Code § 89002(b)(1).
- **Announcements.** An announcement of a meeting if:
 - it is sent to the elected officer's constituents and concerns a public meeting that is directly related to the elected officer's incumbent governmental duties, which is to be held by the elected officer, and which the elected officer intends to attend, or
 - it announces an official agency event or events for which the agency is providing use of its facilities or staff or other financial support.

The announcement may not include the officer's photograph or signature and may include only a single mention of the officer's name, except as permitted elsewhere in Section 89002. Cal. Govt. Code § 89002(b)(9).
- **Business Card.** A business card that does not contain the elected officer's photograph or more than one mention of the elected officer's name. Cal. Govt. Code § 89002(b)(11).

VIII. Penalties for violations of ethics laws

A. The Political Reform Act

Any person who knowingly or willfully violates the Political Reform Act is guilty of a misdemeanor, which is punishable by a fine of up to \$10,000. Cal. Govt. Code § 91000.

A violation of the Political Reform Act may also result in civil penalties of up to \$5,000 and subject the individual to discipline by the official's agency. Cal. Govt. Code §§ 83116, 91005.5, 91003.5. Injunctive relief is also available.

If a court determines that a violation of the Political Reform Act occurred, a court may set aside any official action if it might not otherwise have been taken or approved. Cal. Govt. Code § 91003.

For violations of the gift and honoraria provisions, the Fair Political Practices Commission may bring an action to recover three times the amount of the unlawful gift or honoraria. Cal. Govt. Code § 89521.

B. Government Code section 1090

A violation of Government Code section 1090 may subject a person to a fine of not more than \$1,000 or imprisonment.

Also, a person found to have violated section 1090 is forever disqualified from holding office in the State. Cal. Govt. Code § 1097.

A contract violating section 1090 is void and unenforceable. Cal. Govt. Code § 1092.

C. San Francisco ethics laws

Knowing and willful violations of the ethics provisions of local ethics laws may subject a person to criminal penalties of up to \$10,000 per violation, a year in jail, or both. A violation also may subject a person to civil or administrative penalties in the amount of \$5,000 for each violation. C&GC Code § 3.242. Injunctive relief is also available.

In addition to these penalties, City officers are subject to suspension and removal from office for official misconduct. Charter § 15.105. Section 15.105 defines official misconduct and describes the process for suspension and removal. Any person removed from office because of official misconduct is ineligible for election or appointment to City office or employment for a period of five years after removal. Charter § 15.105(d).

Part Three: Public records & meetings laws

“The very word ‘secrecy’ is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it. Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it.”

— President John F. Kennedy
Address before the American Newspaper
Publishers Association, April 27, 1961

I. Introduction

Good government in our democracy is premised on informed and engaged citizenship, and our ability to govern can never be better or more effective than laws intended to assure the broadest possible public access to government proceedings and records. The policy objective underlying public records and open meeting laws is that citizens share a fundamental right to access information concerning the conduct of their government, and that governmental entities should make their policy decisions openly and with the full benefit of public participation. Cal. Govt. Code §§ 6250, 54950; Admin. Code § 67.1.

As strongly as we in the City Attorney’s Office encourage City officials and employees to be thoroughly familiar with laws governing public records and open meetings, we urge, too, that they embrace these laws not grudgingly but in the spirit of openness, transparency, and accountability that animate the laws. Public service means being ever mindful of the public’s right to be informed about and to participate in our democracy. Citizens who petition public officials and employees – whether to share ideas, to criticize, or to seek information – deserve respect and appreciation for fulfilling a civic duty no less important to San Francisco’s government than our own duty as public servants.

As with almost every area of law, there are few absolutes; exceptions exist in open government laws to accommodate competing protected rights of privacy and confidentiality; and in some instances open government laws are limited to mitigate practical burdens on government that might ensue if such laws were carried to the absolute extreme. Further, the

particular facts attending an issue often are determinative in resolving the issue. But exceptions in open government laws are often narrow and sometimes themselves are not absolute, and particular factual circumstances often must yield to general principles favoring open government.

In our experience, violations of open government laws are more likely to occur from ignorance, confusion, or neglect than from deliberate intent. But it is important to understand that the public may view even unwitting or negligent violations with suspicion. Violations of open government laws invite criticism and undermine the credibility of City government. And they can result in the City's incurring substantial costs and penalties in litigation that it can ill afford.

We encourage all policy body members and department personnel to thoroughly familiarize themselves with public records and open meeting laws by carefully reading this part of the Good Government Guide, and by taking part in the trainings that the City Attorney's Office offers. We also encourage City officials and employees to contact the City Attorney's Office in advance whenever they have questions regarding access to public records or meetings of policy bodies.

II. Legal overview

A. Open government laws

In this part of the Good Government Guide, we primarily address three major laws that promote open government in San Francisco:

- The California Public Records Act (Cal. Govt. Code §§ 6250 et seq.) is the State law governing public access to the records of State and local agencies. Enacted in 1968, it has been amended many times.
- The Ralph M. Brown Act (Cal. Govt. Code §§ 54950 et seq.) – the Brown Act – is the State law governing meetings of local governmental boards, commissions, and other multi-member bodies, all of which it refers to as “legislative bodies.” Enacted in 1953, it has been amended many times.
- The San Francisco Sunshine Ordinance (Admin. Code Chapter 67) imposes additional requirements on City government affecting both the public's access to records and the conduct of meetings of boards, commissions, and other bodies, all of which, except for “passive meeting bodies” (discussed later in the Guide), it calls “policy bodies.” (For convenience, the Guide uses the term “policy body” rather than “legislative body.”) The Board of Supervisors enacted the Sunshine Ordinance in 1993 and the voters substantially amended it in 1999. Since then, the Board of Supervisors has enacted several amendments to the Ordinance.

In addition to these three laws, we address other provisions of State and City law that pertain to open government in San Francisco. The Charter and the Municipal Code impose a considerable number of requirements affecting City records and meetings of policy bodies and regulating other aspects of open government. Many state statutes address whether the

public has access to particular types of public records. In addition, as discussed below, a California constitutional provision embraces open government principles.

For the convenience of the reader, this part of the Guide provides citations to a number of provisions of law. These citations are not intended to suggest that they are the only sources of legal authority regarding public records and open meeting issues. Court cases, opinions of the California Attorney General and the City Attorney, and other sources of federal, state, and local law may be relevant to a particular situation. For that reason, it is often advisable for policy bodies, and departments to consult the City Attorney's Office when responding to public records requests or considering open meeting issues.

B. State-local overlap of open government laws

There is considerable overlap between State open government laws and City laws, including the Sunshine Ordinance. Where helpful, this Guide draws distinctions between State and City law requirements. But often the Guide does not draw such distinctions. Where State and City laws differ, the general rule is that the City must follow the more rigorous standard promoting greater access to public records and meetings of policy bodies. Admin. Code §§ 67.5, 67.21(k). We thus often focus only on that legal standard.

Certain public agencies that have some connection to the City or are physically located within the City are nonetheless legally distinct from City government and are not subject to the Sunshine Ordinance, which is binding only on City government. Among these agencies are the San Francisco Unified School District, San Francisco Community College District, the Office of Community Investment and Infrastructure, San Francisco County Transportation Authority, San Francisco Health Authority, San Francisco Housing Authority, San Francisco Parking Authority, San Francisco In-Home Supportive Services Public Authority, and San Francisco Local Agency Formation Commission. Such agencies are subject only to the Public Records Act, the Brown Act, and, in some cases, other State laws governing public meetings and public records specific to the agency. But, although the Sunshine Ordinance does not of its own force apply to them, these agencies may choose to follow some or all of its requirements, and some of them have.

C. State constitutional protection for open government

In 2004, with the passage of Proposition 59, California voters added Article I, section 3(b) to the California Constitution, creating a constitutional right of access to public records and meetings. But Article I, section 3(b) also states that it does not repeal or nullify existing statutory or constitutional restrictions on access to public records and meetings and does not supersede or modify the right of privacy recognized in the California Constitution.

It is therefore not completely clear what impact this constitutional provision has on access to public records and meetings, particularly in San Francisco, where the Sunshine Ordinance provides for greater openness in government than State law requires. Courts and the Attorney General have generally found that Article I, section 3(b) does not create new rights of public access to records and meetings but instead constitutionalizes existing rights under State law. But that provision also requires courts to broadly construe provisions in State law

that further the people's right of access and narrowly construe provisions that limit the right of access. And it requires that a new restriction in State law on the public's access to records or meetings be accompanied by findings on which the restriction is based.

The California Constitution thus highlights what both State and City law have long recognized: Conscientious adherence to open government laws is essential to democratic self-governance. By constitutionalizing the principle of open government, Article I, section 3(b) has elevated that principle in the public consciousness and has arguably encouraged courts in close cases to come down on the side of open access to public records and meetings of policy bodies.

III. PUBLIC RECORDS LAWS

A. Definition of a public record

The Public Records Act defines a "public record" very broadly. The definition has four elements:

- Any writing, regardless of physical form or characteristics
- Containing information relating to the conduct of the public's business
- Prepared, owned, used, or retained
- By a state or local agency

Cal. Govt. Code § 6252(e). The first element defines a "record." The second, third, and fourth elements define what makes the record "public." The Sunshine Ordinance adopts this definition of "public record." Admin. Code § 67.20(b).

1. A "writing"

The first element of the definition of public record – that it is a "writing" – is immensely expansive. It encompasses any handwriting, typewriting, printing, photostating, photographing, photocopying, transmission by e-mail or fax, and every other means of recording on any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols. Cal. Govt. Code § 6252(g). This concept of a writing goes beyond the traditional written form. It may consist of communications in any medium that contains encoded information, such as a computer tape, video recording, audio recording, voicemail, text message, or photograph. Emails, including attachments to emails, are writings within the meaning of the Public Records Act. Yet, while it is clear that electronic records are "writings," many principles developed under the Public Records Act preceded the current era of electronic communications, and those principles and others are in some respects evolving to catch up with this sweeping technological change.

2. Containing “information relating to the conduct of the public’s business”

The second element of the definition of public record – that it contain information “relating to the conduct of the public’s business” – is also very expansive. The range of actual or potential governmental matters in today’s world is extremely broad. Still, there are some limits to this concept. For example, an employee’s grocery shopping list, kept in an office desk drawer, is not a public record, because it does not contain information about the workings of City government. As another example, a single document that contains notes of an office meeting and notes about the writer’s personal plans for the weekend is part public record (the notes of the meeting) but part not (the notes concerning the writer’s personal plans).

Records housed on a City employee’s or official’s personal electronic device or account (which, as discussed below, can be public records) will on occasion pose close questions as to whether the record contains purely personal information, or has a sufficient nexus to City business to be deemed a public record. The City Attorney’s Office is available to advise on such questions when they arise.

3. “Prepared, owned, used, or retained”

The third element of the definition of public record – that the record be “prepared, owned, used, or retained” (by an agency) – is expansive, too. For example, any record stored on the City’s communications system would be considered “retained” by the City (and also, in most if not all instances, “owned” by the City). Further, a record that a third party holds but that the City has a legal right to obtain and review may in some circumstances be considered “retained” or “owned” by the City. These third-party issues can be complicated and fact-intensive, and it is advisable for departments to consult with the City Attorney’s Office when such issues arise.

4. “By a state or local agency”

The fourth and final element of the definition – that the record be prepared, owned, used, or retained “by a state or local agency” – raises the question of whether work performed for the City by City officials and employees on personal computers, personal cell phones, or other personal communications devices or through personal accounts are records of the City subject to disclosure under the public records laws. The answer is yes. An agency acts through the public officials and employees who serve the agency. Hence, an email, Word document, text message, photograph, voicemail, or other communication on a private device or account of a City official or employee is a public record if it otherwise meets the definition.

In some circumstances, a communication by a City official or employee is not by a “state or local agency” even though it relates to the conduct of public business. For example, a public official running for re-election, using his home computer, emails his campaign consultant (who is not a City official or employee) to discuss the political pros and cons for that official’s campaign of supporting a recently introduced ordinance. This record would not be a public

record, because the email was not sent by the official in his official capacity; it was sent in his capacity as a candidate for public office.

5. Exceptions to the definition

There are express exceptions to the definition of public record. For example, computer software that the City develops is not a public record. Cal. Govt. Code §6254.9(a); Admin. Code § 67.20(b). But these exceptions are few. The large majority of records in the City's possession are public records.

Legal issues concerning disclosure typically center not on whether the record is a public record, but on whether the law authorizes or requires the City to withhold or redact the record. Thus, in ordinary discourse, when someone asks "Is this a public record?" the real question usually being asked is not whether it is a public record, but whether the agency must disclose it to the public.

B. The public records request

City personnel may have difficulty recognizing that they have received a public records request or an effort by a member of the public to make a request. The discussion below clarifies when a request triggers the City's obligation to respond.

1. Form of request

A person may make a public records request orally in person or by phone, or submit it in writing by fax, postal delivery, personal delivery, e-mail, or other electronic communication. Admin. Code § 67.21(b). Departments must honor oral requests; they may ask but may not insist that a request be in writing, to clearly record the timing and content of the request. A sample request form, modeled on the form used by the Clerk of the Board of Supervisors, is found at the end of the Guide. If the requester does not put the request in writing, it is a good practice, though not legally required, for the department to memorialize the request.

2. Records sought must be "identifiable"

A public records request must specify an identifiable record or category of records sought. Cal. Govt. Code § 6253(b). This requirement is not overly strict. It does not mandate exactitude in requests, or limit requests to specific records the requester identifies by date, author, and/or recipient. Rather, it dictates that a request be sufficiently clear and defined so that the department can understand what records are the subject of the request.

The law does not generally allow a requester to look indiscriminately through a department's files where such files are not otherwise made available on a self-service basis to members of the public. Accordingly, a public records request may not seek access to "all of your records." But departments should make a conscientious effort to assist requesters in narrowing requests by identifying the information or records they seek.

3. No “standing” records requests

Neither the Public Records Act nor the Sunshine Ordinance gives a member of the public the right to file a standing request for records that departments may or will create or receive in the future. For example, asking a department to provide a copy of all records to be created in the future pertaining to a particular subject – even if that subject is defined clearly and narrowly – is not a valid public records request. A department may choose to honor a standing request for a particular recurring record, or for a record it expects to create or the requester thinks it will create, but the law does not compel it to do so.

There is one exception to the no-standing-requests principle. The Brown Act provides a limited right to file a specific type of standing request, for future meeting agendas and agenda packets of a policy body. Cal. Govt. Code § 54954.1.

4. Questions are not records requests

A request that a department answer a question or series of questions is not a public records request, and neither the Public Records Act nor the Sunshine Ordinance requires a department to reply to written interrogatories. Nevertheless, departments should make a reasonable effort to assist questioners when public records may exist that would assist in answering written questions. Where a department knows that it has an existing record that is not privileged and that directly answers a written question a member of the public has posed, it is often a good practice for the department to provide that record to the inquirer.

Departments may choose to answer some or all of the written questions they receive, and may even research questions for members of the public. These may be good practices in some instances, but they are not required by law, and the extent to which to respond to written questions is a matter of policy for each department.

5. No special terminology required

A public records request need not use special terminology like “this is a public records request” or “this is a request under the Sunshine Ordinance” to be valid. And the use of incorrect terminology, like “this is a Freedom of Information Act request,” does not render the request invalid. The request merely needs to make reasonably clear that the requester is seeking identifiable records from the City. And even if the request does not mention the Public Records Act or Sunshine Ordinance, the City must adhere to the requirements of those laws in responding, unless the requester clearly instructs otherwise. Similarly, even if a request is phrased as being “under the Public Records Act,” the requirements of the Sunshine Ordinance also will govern the City’s response to the request.

As discussed below, for an immediate disclosure request – a type of public records request recognized only under the Sunshine Ordinance – a special designation is required; but otherwise no special terminology need be used in phrasing such a request.

6. No justification required

A public records request need not state the reason for the request, and the City may not demand an explanation from the requester as a condition of responding to or complying with the request. Cal. Govt. Code § 6257.5; Admin. Code § 67.25(c). Making a records request is a right. It is not a privilege whose exercise is dependent on the good graces of government or on a determination by the City that the request is worthwhile. Nevertheless, the City may ask the requester questions about the request to assist the City in responding, for instance, by helping the requester clarify the scope or nature of the request or narrow an unduly broad request.

7. Anonymous requests permitted

The public records laws do not require a requester to submit a request using the requester's true name. Accordingly, as a general rule, the City must respond to anonymous public records requests, or requests made under a pseudonym, provided that the requester provides the City with information sufficient to allow the City to transmit a response to the requester.

8. Requests for requests permitted

A requester may seek access to public records requests that a department has received. The number and content of such requests and the identity of requesters are matters of public interest. This information can facilitate oversight of government, by letting the public know how our public records laws are working. In special circumstances, the identity of a past requester might be redacted for reasons of privacy, or for similar reasons. The general rule is that personal contact information of past requesters is redacted, for reasons of privacy.

9. Types of access to records

A requester may seek to inspect records, or obtain copies of records, or both. Cal. Govt. Code §§ 6253(a), (b); Admin. Code §§ 67.21(a), (b). Typically the request itself, or the surrounding circumstances, will make clear the type of access the requester is seeking. If not, the department may seek clarification from the requester.

C. Responding to a public records request

1. Providing assistance to requesters

The Public Records Act requires departments to assist members of the public to identify records and information that are responsive to the request or the purpose of the request, if stated; describe the physical location and information technology in which the requested records exist; and provide suggestions for overcoming any practical basis for denying access to the records or information sought. The department will have satisfied these requirements even if it is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester. Cal. Govt. Code §§ 6253.1(a), (b).

If a requester has addressed a request to the wrong department, or if the department that received the request knows that another department may have responsive records, the department that received the request typically should as soon as possible inform the requester of the other department(s) that may have responsive records. Admin. Code § 67.21(c). A department should follow this procedure whether or not it has responsive records. But this procedure need not be followed where it clearly appears that the requester is interested in receiving records only from the department to which the request was submitted, or where it is clear that the requester would know to contact other departments for related records.

Further, if most of the information in a requested record is exempt from disclosure, the department must inform the requester of other records, if any, that may contain some of the information the requester seeks. Admin. Code § 67.27(d); see also Admin. Code § 67.25(c).

As noted earlier, departments generally may not inquire about the purpose of a request, and may not limit access to a public record otherwise subject to disclosure based on the purpose of the request. Cal. Govt. Code § 6257.5. But sometimes, particularly where the request is overly broad or unclear, it may be appropriate to ask about the requester's objectives where the inquiry would help the department identify the records and satisfy the request. Admin. Code § 67.25(c). When a department receives an extremely broad request and has reason to believe that the requester actually is seeking a more limited number of records, the department may check with the requester to see if a narrower request would yield the records actually being sought.

2. Providing a description of records

The Sunshine Ordinance allows a person to ask a department for information regarding the existence, quantity, form, and nature of records relating to a particular subject. When requested to do so, the department must respond in writing within seven days. Admin. Code § 67.21(c). The Ordinance does not provide for any time extension to comply with such a request.

This procedure enables a person to get enough information relating to a subject to make or refine a public records request. It does not require a department to provide an inventory identifying each record that may pertain to a subject, or to create a privilege log detailing records the department has withheld from disclosure in response to a request. Nor does it require a department to respond with exactitude. For example, a department may use approximations when describing the quantity of records relating to a subject. As another example, when describing the nature of records, a department may specify different categories without having to detail every specific type of record within each category.

3. Timely response

The City must respond to a public records request promptly in meeting required timelines. Cal. Govt. Code § 6253(b); Admin. Code § 67.21(b). There are two types of requests – standard requests, and immediate disclosure requests – with different response deadlines.

a. Standard requests: 10 calendar days

i. Time for response

Unless the requester makes an immediate disclosure request, departments must respond to a request to inspect or copy records within 10 calendar days. Cal. Govt. Code § 6253(c).

ii. Extension of time for response

A department does not have an open-ended right to extend the time for responding to a public records request. But in four circumstances, specified below, departments may have up to 14 additional calendar days to respond. To invoke such an extension, the department must inform the requester in writing of the extension within the initial 10-day period, setting forth the reasons for the extension and the date on which a response will be made. Cal. Govt. Code § 6253(c). It will often be appropriate to state the maximum period for the extension because a precise date for completing the response may be elusive; but, even if so, it is advisable for the department to make a good faith effort to respond earlier than that deadline. The department need not obtain the requester's consent to invoke an extension of time for one of the four specified reasons.

The types of circumstances permitting the extension are limited to the need for the department to do one or more of the following:

- Search for and collect the requested records from facilities separate from the office processing the request.
- Search for, collect, and appropriately examine a voluminous amount of separate and distinct records included in a single request.
- Consult with another department or agency that has a substantial interest in the response to the request.
- As to electronic information, compile data, write programming language or a computer program, or construct a computer report to extract data.

Cal. Govt. Code § 6253(c). Other circumstances, such as the absence from work of an employee with responsive records, do not justify invoking an extension of time, but may nonetheless pose practical problems in timely responding to a request. In such cases, the department should consult with the City Attorney's Office as soon as the problem is recognized.

Although departments have 10 days to respond to a standard request, and may be able to invoke an extension of up to 14 days, in either instance they should respond as soon as practicable within those limits, taking into consideration an appropriate balance of the resources needed to respond to the request and the department's need to fulfill its other responsibilities. Admin. Code §§ 67.21(a), (b).

b. Immediate disclosure requests: next business day

i. Requirements for an immediate disclosure request

The Sunshine Ordinance requires a faster response for “immediate disclosure requests.” This faster process applies only to certain written requests. Admin. Code § 67.25(a). There are two requirements for a public records request to be a valid immediate disclosure request.

First, the words “Immediate Disclosure Request” must appear across the top of the request and on the envelope, subject line, or cover sheet transmitting the request. Admin. Code § 67.25(a). These rules for designation of an immediate disclosure request are more than a formality. They are designed to alert departments, which may be inundated with incoming mail and email, that an expedited time frame for processing the records request applies. A request that does not comply with these rules is not an immediate disclosure request. But if a department perceives that the requester intended but failed to make an immediate disclosure request, it may in its discretion choose to treat the request as if it were an immediate disclosure request. In such cases, it may be advisable for the department to consult with the City Attorney’s Office.

Second, the purpose of the immediate disclosure request is to expedite the City’s response to a “simple, routine, or otherwise readily answerable request.” Admin. Code 67.25(a). The Sunshine Ordinance does not bestow on requesters the right to transform any or every public records request into an immediate disclosure request simply by so designating it. Rather, the Sunshine Ordinance specifies that for more extensive or demanding requests, the maximum deadlines under the Public Records Act and the Sunshine Ordinance for responding to a request apply. Admin. Code § 67.25(a). Thus, even if a requester properly formalizes the request by use of the “Immediate Disclosure Request” designation, a request that is not simple, routine, or otherwise readily answerable is not truly an immediate disclosure request.

ii. Time for response

Immediate disclosure requests must be satisfied no later than the close of business the next business day. Admin. Code § 67.25(a). The department should respond to the requester within that time period by fax or email, if the requester has provided that contact information. If the requester has provided a postal address only, mailing the response within the time period satisfies the deadline.

iii. Extension of time for response

Departments may invoke an extension of no more than 14 calendar days to respond to immediate disclosure requests. Admin. Code § 67.25(b). While the Sunshine Ordinance mentions a 10-day extension period, that provision incorporates an expired provision of the Public Records Act, and one that is framed in terms of 10 “business days,” which is typically equivalent to 14 calendar days. Further, when the voters amended the Ordinance and created the immediate disclosure request process, the provision of the Public Records Act then in effect used 14 calendar days as the maximum time frame for extensions, and that provision remains in effect. Cal. Govt. Code § 6253(c). Therefore, we read the Sunshine

Ordinance to allow an extension of up to 14 calendar days to respond to an immediate disclosure request.

If a department invokes the 14-day extension, it must notify the requester by the close of business on the business day following the request. Admin. Code § 67.25(b). A department may invoke the extension on one of the following grounds: (1) the voluminous nature of the records requested, (2) location of the records in a remote storage facility, and (3) the need to consult with another interested department. Admin. Code § 67.25(b). But, as previously discussed, the Public Records Act also permits an extension for responding to a standard public records request to compile electronic data, write programming language or a computer program, or construct a computer report to extract data. Cal. Govt. Code § 6253(c)(4). That provision was enacted after the voters amended the Sunshine Ordinance and created the immediate disclosure request process. But, in creating that process, the Ordinance evinces an intent to follow state law regarding extensions of time to respond to records requests. Accordingly, we read the Sunshine Ordinance to import into the immediate disclosure request process this fourth ground for an extension of time.

As previously discussed, some requests designated as immediate disclosure requests are, technically, standard public records requests because they are not “simple, routine, or otherwise readily answerable.” But, as noted above, the Sunshine Ordinance provides for an extension on certain grounds of up to 14 days to respond to an immediate disclosure request, a period that would likely accommodate many such requests that are not “simple, routine, or otherwise readily answerable.” Given this extension provision, departments should attempt in good faith to adhere to the extension limitation of 14 days.

But sometimes that simply may not be feasible, because of the nature of the request. In such an instance, the department may adhere to the time deadlines governing standard requests – an initial 10-day period for response, plus a possible extension of up to 14 additional days.

c. Description requests: 7 calendar days

As noted earlier, the Sunshine Ordinance allows a member of the public to obtain a description of the existence, quantity, form, and nature of a department’s records on a subject. Such a request is technically not a public records request, though it may easily be confused with one, especially when the description request accompanies a public records request. Departments must respond to description requests within 7 days. The Ordinance does not authorize time extensions for responding to such requests. Admin. Code § 67.21(c).

d. Calculating time

i. Date of receipt of request

If a department receives a public records request after regular business hours (for example, an email request received after 5:00 p.m. on a weekday), or on a weekend or holiday, the next business day is considered the date of receipt. Cal. Civ. Code § 10.

ii. Deadline for response

As previously discussed, the deadline for responding to an immediate disclosure request is close of business the next business day following the request. The deadline for responding

to a standard public records request is 10 days after the request. For this purpose, the date of receipt is not included when counting the days to the deadline. For example, if the date of receipt is Monday, May 1, the first day counted to determine the deadline would be Tuesday, May 2, and the tenth day counted would be Thursday, May 11 – when the response would be due.

As the above example indicates, weekends and holidays after the date of receipt of a standard public records request are counted when determining the deadline for response. However, if the deadline actually falls on a weekend or holiday, the next business day is considered the deadline. Cal. Civ. Code § 11. Thus, for example, if the tenth day to respond to a standard public records request is Saturday or Sunday, the following Monday is considered the deadline – unless that Monday is a holiday, in which case Tuesday would be the deadline.

iii. Deadline for response following extension of time

The above rules for determining when a response is due apply to the deadline for a response when an extension of time has been invoked. If the 10-day deadline for responding to a standard public records request falls on a Friday, Saturday, or day preceding a holiday, the time for the extension starts to run on the next day, be it a Saturday, Sunday, or other holiday. But if the response deadline with an extension of time falls on a weekend or holiday, the department may consider the next business day as the deadline.

e. Duty to produce records incrementally

Departments must produce records as soon as reasonably possible on an incremental or “rolling” basis, when so requested. Therefore, even when a department has additional time to respond and is collecting a large quantity of records, if requested, it must produce records as it locates and reviews them – providing the review is in all respects complete – rather than waiting until it has located and reviewed all potentially responsive records. Admin. Code § 67.25(d). In some cases, because of the relationship between two records or sets of records, review of the first will not necessarily be complete until the department has completed review of the second. If the department must redact a responsive record, review of the record is not complete until the department has made the redaction.

f. The rule of reason

City departments must balance the duty to respond to public records requests with their obligation to maintain a high level of service generally to the public. In rare circumstances, responding to a single public records request may be so burdensome and time-consuming that the demands placed on the department to respond within the required time frame would unreasonably impinge on the department’s ability to perform its other duties. The same is true for a series of requests from the same requester that cumulatively impose extreme burdens on a department. In these unusual instances, the department may invoke a “rule of reason” (a common law doctrine) under which it will limit the amount of time per day or week it will devote to responding. If circumstances may warrant invoking this rule, the responding department should consult with the City Attorney’s Office before doing so.

In general, the timing of a department’s response to a request to inspect records or to receive copies of records must be reasonable in light of all the circumstances, including: the volume

of records to be inspected or copied; whether the records are readily available; the need, if any, to review the records to make appropriate redactions; and the complexity of the review and redaction process. In particular instances, other considerations might be relevant: for example, the need, if any, to assign staff to oversee the requester's inspection of records to protect the integrity of the records, and whether the department is actively using responsive records such that their production at a given time would disrupt the department's operations by depriving it of access to the records.

Without unreasonably delaying the time for a requested inspection of records to occur or be completed, or the time for producing copies of records, a department may consider such factors as those discussed above in determining the timing and logistics of an inspection, or the time for producing or completing the production of responsive records. In compelling circumstances, the rule of reason, rather than specific deadlines, may govern the pace of the department's response, to enable it to balance its duties under the public records laws with its obligation to maintain a high level of service to the general public.

Departments must not place unnecessary roadblocks in the way of requesters, however. Before invoking the rule of reason to govern the timing of a response, department personnel should endeavor to work cooperatively with the requester to determine if the request or requests can be narrowed to minimize barriers to a prompt response, or to at least prioritize records the requester would like to receive first.

Because open government laws place great importance on responding promptly to public records requests, a department should neither lightly nor routinely invoke the rule of reason as a basis for elongating the time for fully responding. Indeed, we advise City personnel against invoking the rule of reason unless they have first consulted with the City Attorney's Office about their particular circumstances.

4. Proper response

a. The duty to respond

Departments may not refuse to respond to a public records request. In some circumstances, failure to respond could subject an employee to discipline. Also, such failure could lead to a legal action in which the requester could recover attorneys' fees against the City.

Yet sometimes for good faith reasons departments miss deadlines for responding to public records requests. Once a department realizes it has missed or will miss a deadline, it should expeditiously contact the requester and process the request as quickly as possible.

b. The duty to search for records

i. A "reasonableness" standard

The duty to respond to a public records request necessarily encompasses a duty to search for responsive records. The City must make a good faith, reasonable search effort. What constitutes a reasonable search depends on the circumstances. In some cases, a knowledgeable department employee will definitively know whether responsive records exist and, if so, where they may be located. But often the department will need to circulate

the request among those employees likely to have or know of responsive records. In a similar vein, the department often will need to consult those files where responsive records likely would be found. Files in storage must be retrieved and searched if they are likely to contain responsive records.

But the duty to search for records does not require a department to try to find a needle in a haystack or expend extraordinary efforts that are unlikely to locate responsive records. Further, as noted above, the more burdensome the search required, the more likely will be the need to invoke an extension of time to respond to the request or, in more extreme cases, to invoke the rule of reason warranting a more drawn-out search. It is possible there may be a circumstance so extreme that it is appropriate for a department to decline to conduct a comprehensive search, but before taking such an approach, the department should consult with the City Attorney's Office.

ii. A duty to search all media

Some public records requests are so focused that they may require only a very limited search for records that are easily located in a discrete hard copy file or electronic file. For example, a request for a copy of a specific letter from a named City employee to another named employee, regarding a specific subject, requires only a search for that record, and in such an instance, there likely will be only one or two places where the record would be found. But many public records requests are not as narrowly focused. For example, a request for records on a particular subject, not limited by the text of the request or by its context to a specific medium, will necessitate a search of all media in which such records may reasonably be found.

As noted earlier, records relating to City business on personal electronic devices or accounts of City employees and officials are subject to disclosure in response to a public records request. As a general rule, a public records request need not specifically identify such devices and accounts to encompass them. Rather, unless the text or context of the request indicates otherwise, it should be assumed that the requester is seeking responsive public records on any medium, including personal electronic devices or accounts of employees and officials. Accordingly, the department's search for responsive records must encompass the employee's or official's search for responsive records on their personal electronic devices or accounts if responsive records might reasonably be found there. Where it is unclear whether a requester is seeking records on personal devices or accounts, the City may contact the requester to obtain clarification,

iii. The duty to search emails

Emails that are easily retrievable by the user must be searched in response to a public records request. This includes emails that have not been deleted; emails that have been put in the "Deleted Items" folder but have not been emptied from that folder (and hence are immediately retrievable); and emails that have been deleted and emptied from that folder but remain immediately retrievable by accessing the computer's "Recover Deleted Items From Server" function.

c. Types of responses

Following a reasonable search for responsive records, the department may not have located any. In that event, it must notify the requester in writing that it has no responsive records. Cal. Govt. Code § 6255(b).

If, on the other hand, responsive records have been found, the department must either disclose them or inform the requester in writing that they are being withheld because they are exempt from disclosure, stating the legal basis for the exemption. Cal. Govt. Code §§ 6253(c), 6255(b); Admin. Code §§ 67.21(b), 67.27. Often there will be both exempt and nonexempt records that are responsive, in which case the department must disclose the nonexempt records while stating the legal basis for withholding the other records. In a similar vein, an individual record may be partially exempt from disclosure, in which case the department will redact the exempt portion of the record before disclosing the record, stating the legal basis for the redaction. Admin. Code § 67.26.

d. No privilege log required

The law does not require a responding department withholding records to create a privilege log identifying the withheld records. It is common to prepare a privilege log in a litigation context, but this litigation protocol is not applicable in the public records context.

e. No duty to create record

As a general rule, if a department does not have a requested record, the law does not require it to create the record. This principle applies if the record never existed or if it existed but was lawfully destroyed prior to receipt of the request. But a department may choose to create a new record in response to a public records request, such as a document that answers an inquiry, for a variety of reasons, including avoiding the possibility of a more burdensome public records request that might follow a refusal to create the record.

This rule – that there is no duty to create a record in response to a public records request – developed before the advent of electronic records. It continues to be valid as a general rule, including as to discrete electronic records, such as an email. But, as discussed below, where a request seeks the compilation of existing electronic data, different considerations apply.

f. Information in electronic form

i. General overview

The Sunshine Ordinance requires the City to make information stored in electronic form available to a member of the public in any form requested so long as the information is available to or easily generated by the department in that form, including disk, tape, print-out, or on a computer monitor. Admin. Code § 67.21(l). Members of the public do not have a right to inspect public information on a computer monitor where the information visible on the monitor is inextricably intertwined with information that is properly exempt from disclosure. Admin. Code § 67.21(l). But departments must produce in an appropriate form the publicly disclosable information.

The Public Records Act imposes additional requirements about information that is in an electronic format. Cal. Govt. Code § 6253.9. As a general rule, the Act requires a department to make the information available in any electronic format in which it holds the information, and to make a copy of an electronic record available in the format requested if the department has used that format to create copies for its own use or for other agencies. Cal. Govt. Code §§ 6253.9(a)(1), (2). But these provisions do not require a department to reconstruct a record in an electronic format if the record is no longer available electronically or create it in a format it has not used. Cal. Govt. Code § 6253.9(c). However, the text of the Sunshine Ordinance on these issues is not clear, so the safer legal course is to make electronic records available in the format requested if that can be easily accomplished without requiring the department to reprogram a computer. This general approach is subject to limitations, discussed below, regarding metadata and easily manipulated formats.

The Sunshine Ordinance does not require a department to program or reprogram a computer to respond to a public records request. Admin. Code § 67.21(l). But, as explained below, the Public Records Act does. In this respect, the rule that a department has no duty to create a record has evolved in the electronic age: where information exists in electronic form, a department must engage in data compilation, extraction, or programming to produce the electronic record, provided the requester is willing to pay for the cost of production which includes the programming or reprogramming of the computer. Cal. Govt. Code § 6253.9(b)(2). In similar fashion, a department must produce an electronic copy of a record that it ordinarily produces at regularly scheduled intervals. Cal. Govt. Code § 6253.9(b)(1).

ii. Portable Document Format, or PDF

To facilitate accessibility and ease of use, many City departments provide their electronic records to the public as PDF files. PDF, which stands for “Portable Document Format,” is a file format created by Adobe Systems in the early 1990s to facilitate the exchange of electronic documents across multiple operating systems, and without requiring the purchase of specific software or hardware. PDF is now an open standard, meaning it is available without charge, is non-proprietary, and can be accommodated by different software. The advantages of providing records in this format are that:

- PDF is a free, open format.
- PDF records are viewable and printable on any computer platform.
- PDF records typically look like the original records and thus preserve the integrity of the original information.
- PDF records can enable full-text searches to locate words and terms features in PDF documents that are saved in electronic format.
- PDF records work with assistive technologies to make the information available to persons with disabilities.

iii. Metadata

Sometimes a requester seeks a record in its original electronic format, which likely involves proprietary software, such as Microsoft Word or Excel. In such instances, the electronic

document will usually contain embedded, hidden information known as “metadata.” Metadata may include information such as when the document was originally created; the document’s authors and editors; comments shared among co-authors and editors; and tracked changes in versions of the document before its completion. These metadata may not be readily apparent in the final document, but may nonetheless be fully available to the recipient were the document provided in its native file format. Depending on the nature of the record requested, some or all of the metadata it contains may be properly exempt from disclosure. In still other instances – including comments that may contain legal advice, medical, personnel or otherwise private information – the disclosure of metadata might be restricted or actually prohibited by law.

While case law does not provide authoritative guidance on legal questions relating to public disclosure of metadata, and while technologies continue to evolve, there is no evidence that either the Public Records Act or the Sunshine Ordinance was intended to require public entities to search, and then review and possibly redact, metadata in electronic records. Neither is there an apparent legislative intent to require government agencies to produce records in their electronic formats if their release would jeopardize or compromise the security or integrity of the original records, or of any proprietary software in which they are maintained. Cal. Govt. Code § 6253.9(f).

At the same time, department personnel should consider the usability of public information provided to requesters in responding to public records requests. In asking for a public record in a native file format like Microsoft Excel, for example, a requester may simply be seeking a format that will enable searching, querying, manipulating and summarizing public information in a manner that is far easier than if the record were provided in a scanned PDF or on a printed page. In some instances, the very same technology innovations that can present difficult public records questions may help resolve these issues through conversion to file formats that both meet the requester’s needs and avoid problems with unauthorized disclosure of metadata. Departments seeking further advice on these issues or other issues pertaining to metadata, including where a public records request specifically seeks metadata, should consult with their information technology staff and with the City Attorney’s Office.

A Board of Supervisors’ policy directs its clerk to provide responsive records in the original format when the requester so requests. Other departments may wish to consider their own policy options in light of the possible risks of unintended or impermissible disclosure of metadata in documents specific to their own department’s functions.

iv. Information on personal communications devices

Communications relating to the City’s business that a public employee or official sends or receives on personal electronic devices such as cell phones and personal computers are subject to disclosure as public records. The key criteria for determining whether such a communication is a public record are the content and context of the record, including the purpose of the communication and the sender(s) and intended recipient(s); whether it concerns City business; and whether a City official or employee has received or created it in the performance of work duties, even if not required or solicited. For more information on

this issue, see the memorandum entitled, “Public Records on Personal Electronic Devices” (March 24, 2017) on the City Attorney’s website, discussing the California Supreme Court’s decision in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.

This does not mean that officers and employees must retain such communications. Personal electronic devices may have limited storage capacity, and communications on them, if deemed to be public records, would be subject to the department’s records retention policy. See Section IV below. As explained there, these policies do not require retention of all public records, but only certain types of records as specified in State and local law. Examples of public records that the law does not require the City to retain include, but are not limited to, the large majority of text messages, voice messages, and emails. On the other hand, even if a record on a personal electronic device does not have to be retained, if there is a public records request that might encompass the record, and the record has been retained, it must be reviewed to determine whether it is a public record and, if so, whether it is responsive to the request and whether it is exempt from disclosure.

5. Fees

a. No fees for records search

Departments may not charge a fee for the costs incurred in searching for, locating, or collecting records to respond to a public records request. Cal. Govt. Code § 6253(b); Admin. Code § 67.26.

b. No fees for redacting exempt information

Departments may not charge a fee for the costs incurred in redacting exempt information from a record to be disclosed in response to a public records request. Cal. Govt. Code § 6253(b); Admin. Code § 67.26.

c. No fees for inspecting records

Departments may not charge a fee for a requester to inspect records. Admin. Code § 67.28(a). In some circumstances, a department may deploy staff to sit with requesters while they inspect records, to ensure the security of the records. The department may not charge a fee for this use of staff time. If the department has to make a new copy of a record for the requester to inspect because redactions have been made in the original, the department may not charge a fee for that inspection copy.

d. Fees for copies

Departments may charge a fee for the duplication and mailing of copies of records. Cal. Govt. Code § 6253(b). Departments may require payment before providing the copies. Subject to the important limitations below, the decision to charge a fee, the amount of the fee, and the process for payment, are within each department’s discretion, provided the discretion is not exercised unreasonably and is free of favoritism or discrimination.

For records routinely produced in multiple copies for distribution, such as copies of an agenda reproduced for a meeting, a department may charge 1¢ per page, plus postage. Admin. Code §§ 67.9(e), 67.28(b). For records assembled and copied to the order of the

requester, a department may charge no more than 10¢ per page, plus postage. Admin. Code § 67.28(c). A record that a department originally reproduced in multiple copies, but now must again reproduce in response to a public records request, such as the agenda for a past meeting of a policy body, is subject to the higher charge. If the meeting has not yet occurred, though, the law is unclear on the fee that may be charged for copies of agendas and agenda materials that must be reproduced in response to a public record request. In this circumstance, we advise departments to charge only 1 cent per page for agendas and agenda materials.

A department may establish higher copying fees only if it prepares and posts an itemized cost analysis establishing that the per page direct cost of reproduction exceeds the above amounts. Admin. Code § 67.28(d).

Where the requester seeks a copy of a record on a medium other than paper, the City may charge for the cost of the medium on which the information is duplicated. Admin. Code § 67.21(l). A department may charge up to \$10 for video copies of video recorded meetings. Admin. Code § 67.28(e). There is no specific dollar limit on the charge for audio copies of audio recorded meetings, but, as with video copies or any other non-paper medium, the charge may not exceed the cost of the medium on which the information is duplicated.

e. Special fees for copies and other services

Although the Sunshine Ordinance generally limits the fee for photocopies of records to 10¢ per page, state or City law may specially authorize certain departments or officials (such as the County Clerk, Assessor-Recorder, and Registrar of Voters) to charge higher fees for photocopies and services such as providing certified copies of documents, or providing copies of certain types of records. These special fees are presumptively valid, but we advise departments and officials to consult first with the City Attorney's Office if they have questions regarding such fees.

f. Fees for electronic records

As previously noted, under the Public Records Act, a fee may be charged for data compilation, extraction, or programming of electronic information necessary to produce an electronic record. Cal. Govt. Code § 6253.9(b)(2). This fee is understandably not mentioned in the Sunshine Ordinance, because this obligation under the Act to produce electronic records was added a year after the last major revision of the Ordinance in 1999. Indeed, the Ordinance says – in contrast to the later-enacted provision in the Act – that there is no legal obligation to program or reprogram a computer. Admin. Code § 67.21(l).

For other electronic records, however, requesters may be charged no fee, other than the cost of the physical medium used to transmit the record, such as a CD. Admin. Code sec. 67.21(l). Thus, for example, if an email or memorandum is provided to a requester in PDF format, there is no fee. The Sunshine Ordinance does not expressly authorize such a fee, and the types of factors that the Ordinance identifies as justifying the charging of fees focus on costs associated with producing hard copies of records for requesters. Admin. Code §§ 67.28(b), (c), (d).

D. Exemptions from disclosure

The Public Records Act exempts certain classes of records from disclosure. As discussed later, the Sunshine Ordinance limits the City's ability to claim some of these exemptions. Interpreting the scope, meaning, and application of exemptions may present complex legal and factual questions that require consultation with the City Attorney's Office.

The California Constitution and the Public Records Act create, and the Sunshine Ordinance recognizes and enhances, a general right of public access to public records. Therefore, the law always requires the City to justify its refusal to disclose a record by specifying the legal basis. See generally Cal. Govt. Code § 6255(a); Admin. Code §§ 67.27(a)-(c).

Some records contain both exempt and non-exempt information. A department may not withhold an entire record on the basis that some of the information in it is exempt. Admin. Code § 67.26. Instead, the department must redact the exempt material and indicate the legal basis for the redaction. Admin. Code § 67.26.

The exempt status of a record often means that a department may, but need not, decline to disclose it. But in other instances, such as where State or federal constitutional privacy interests of individuals or a statutory ban is involved, the department must not disclose a record even if it wishes to do so. Whether an exemption is mandatory or discretionary may not always be clear. Departments with questions about whether they must invoke an exemption, or may choose not to, should consult the City Attorney's Office in advance.

If a department voluntarily discloses a record that it may withhold, then, as a general rule, it waives its privilege to withhold the record in the future. Cal. Govt. Code § 6254.5. Thus, as a general rule, department may not disclose a record to one member of the public and withhold that record from another member of the public. But certain types of disclosures – for example, to another governmental entity, or if otherwise required by law – do not necessarily require disclosure of that same record to a member of the public. Cal. Govt. Code §§ 6254.5(b),(e). And if the department has made an inadvertent or unauthorized disclosure that compromises its rights (for example, by inadvertently disclosing a record covered by the attorney-client privilege), the waiver principle does not apply. Further, if a department inadvertently compromises a third party's rights by disclosing a record it should have withheld, it may not compound the error by making the same wrongful disclosure to another member of the public. For example, if a department has violated a person's privacy by not redacting a home address or home phone number in a record given to a requester, the department may not repeat the error when giving the same record to a second requester.

Individual employees generally lack the authority to waive a privilege to withhold a record. Depending on the circumstances, only the policy body that oversees the department, the department head, or other authorized personnel may make such a decision. Unauthorized disclosure of a privileged record is official misconduct and may subject the person who made the disclosure to disciplinary action, criminal prosecution, or both. C&GC Code §§ 3.228, 3.242.

Some grounds for nondisclosure commonly arise. Below we discuss some of these. We do not discuss all the exemptions available under State and federal law; many apply only to specialized types of records and some rarely apply.

1. Exemption under state or federal law

The United States Constitution, the California Constitution, and federal or State statutes and regulations exempt from disclosure, or prohibit disclosure of, certain records. The Public Records Act incorporates these laws by general reference in an exemption. Cal. Govt. Code § 6254(k). This exemption specifically references the California Evidence Code but is not limited to the various privileges and other provisions there that limit a party's access to information. Rather, under this exemption, where disclosure would violate any federal or State law, the City may not release the record. Where federal or State law does not prohibit disclosure of a record but authorizes nondisclosure, the City may decide whether to disclose.

The Public Records Act catalogues alphabetically many exemptions derived from other State statutes. Cal. Govt. Code §§ 6276.02-6276.48. These are examples of laws that are incorporated into the Act through the exemption referenced above. The list is extensive. For example, it begins with 18 separate laws on confidential AIDS-related information, including provisions in the California Penal Code, Health and Safety Code, Insurance Code, and Welfare and Institutions Code. Cal. Govt. Code § 6276.02. And that is only the beginning; there are more than 500 statutory references cited. But even this extensive listing is not exhaustive as to state statutes, and it does not include references to federal law (constitutional, statutory, or regulatory) or to state administrative regulations or state constitutional provisions. Cal. Govt. Code §§ 6275, 6276.

2. Privacy

The California Constitution includes an individual right to privacy. Both state and local law recognize as a general principle that the right to personal privacy sometimes precludes disclosure of public records or information contained in those records. Cal. Govt. Code §§ 6250, 6254(c); Cal. Const., Art. I, §§ 1, 3(b); Admin. Code §67.1(g); Admin. Code Chapter 12M. These authorities may protect private information or records from disclosure even absent a statutory or constitutional provision addressing the specific information or type of record in question.

Some laws ban disclosure of information based on the privacy interests of individuals. For example, California Welfare and Institutions Code § 10850 makes confidential records that concern individuals who receive certain public social services. In such circumstances, the bar on disclosure is absolute unless the law provides specific exceptions where disclosure is mandated or permitted.

In other circumstances, the privacy bar to disclosure, while not absolute, is still high. In these instances, departments must determine whether disclosure sufficiently serves the public purpose of providing oversight of government – assisting in monitoring the functioning of government – to warrant release of the record and the attendant compromise of an individual's privacy. The level of the bar will depend on the nature and strength of the privacy interest. Privacy has many dimensions and cannot neatly be reduced to scientific measurement. Where the privacy interest is relatively weak, a weaker justification for disclosure in the public interest may suffice. But if the justification for public disclosure is

itself weak, a relatively weak privacy concern may be sufficient to justify not disclosing the record.

a. Privacy interests of city employees and officials

Departments must not disclose “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” Cal. Govt. Code § 6254(c). But not all personnel records are automatically exempt. As a general rule:

- Members of the public may see records that contain a City employee’s name, current or past job classification, current or past job assignment, and actual wages earned including overtime. Admin. Code §§ 67.24(c)(3), (4). There may be narrow exceptions to this general rule; for example, in limited circumstances some of this information for certain peace officers possibly may be withheld for safety or security reasons.
- The City must disclose the amount, basis, and recipient of any performance-based increase in compensation or benefits or any other bonus that it awards to any employee. Admin. Code § 67.24(c)(6).
- The City must disclose the job pool characteristics and employment and education histories of all job applicants who accept employment with the City. Admin. Code §§ 67.24(c)(1), (2).

But, because of the right to privacy, as a general rule the City may not disclose personal contact information about employees such as home address, telephone numbers, or personal e-mail address, or certain types of personal demographic information such as age, date of birth, race or ethnicity, sex, and marital status. Under very narrowly defined circumstances, the Public Records Act authorizes limited disclosure of some of this information. Cal. Govt. Code § 6254.3. Disclosure of an employee’s social security number is strictly prohibited. Cal. Govt. Code § 6254.29. It generally is permissible to supply aggregate data in response to a request for individualized data, provided that aggregate data does not, directly or indirectly, identify demographic characteristics such as those specified above for specific employees.

Further, certain types of personnel records generally may not be disclosed. For example:

- The law generally considers a supervisor’s performance evaluation of an employee a private matter that is not subject to disclosure. Even if the evaluation is favorable, it is not generally for public consumption.
- Generally the City must not disclose records containing medical or disability information about employees. Federal and state statutes provide broad protection for such information.
- Peace officer personnel records receive special protection under State law. Cal. Pen. Code §§ 832.7, 832.8. But not all information pertaining to a peace officer qualifies as a “peace officer personnel record.” For example, an officer’s name and salary is generally not exempt from disclosure. And a department’s official incident report in which an officer’s name is mentioned is not a peace officer personnel record.

Records concerning discipline of specific City employees, or circumstances that might warrant their discipline, often pose difficult issues. To the extent permitted by law, the Sunshine Ordinance requires the City to disclose records of an employee's confirmed misconduct involving personal dishonesty, misappropriation of public funds, resources, or benefits, unlawful discrimination, abuse of authority, or violence. Admin. Code § 67.24(c)(7). Whether the employee's misconduct is confirmed, and whether it is the type of misconduct addressed by the Ordinance, is sometimes unclear. But even if there is confirmed misconduct as defined by the Ordinance, disclosure of such a record is permitted only if it would not violate privacy rights under State law.

The Ordinance does not directly address other issues relating to actual or alleged employee misconduct, such as the treatment of: unresolved or uninvestigated complaints against employees; complaints that have been investigated and resolved in the employee's favor; and records of ongoing personnel investigations. We recommend that departments faced with requests for such records consult the City Attorney's Office. The privacy issues pertaining to these types of personnel records can be complex, and other considerations in addition to privacy, such as the need to maintain effective investigations and the need to maintain public confidence in City employees and processes, may be relevant.

The law protects the privacy of City officials as well as City employees. For example, the City should not, without a commissioner's consent, disclose to the public that commissioner's personal e-mail address, even if the commissioner has disclosed it to commission staff, except possibly where the commissioner has used it as a matter of course in frequent communications with members of the public to conduct City business. See generally Cal. Govt. Code § 6254.3(b). But departments should make available a City e-mail address at which members of the public may contact City officials, including commissioners. As another example, the Public Records Act strictly prohibits posting on the internet the home address or phone number of any elected or appointed official, defined broadly to include not merely the Mayor and members of the Board of Supervisors but many others, including active and retired peace officers. Cal. Govt. Code §§ 6254.21, 6254.24. Given the volume of material that many departments now post on their websites, it is important to take care to avoid inadvertently disclosing this type of information.

b. Privacy interests of members of the public

The statutory and constitutional protections for privacy also apply to information in City records about members of the public. For example, social security numbers may not be disclosed to the public. Cal. Govt. Code § 6254.29. To take another obvious example, a patient in a City hospital or health clinic has medical privacy rights that the public records laws cannot override. Similarly, departments may not disclose medical information pertaining to a disability that an individual submits to the City in connection with a request for access to a City building or modification of a City program, unless the individual consents to the disclosure.

Concerns about identity theft warrant redaction not merely of social security numbers, but also of driver's license numbers, credit card numbers, bank account numbers, and similar information in records of transactions between the City and members of the public. This type of information pertaining to City employees and officials likewise warrants privacy

protection. In some circumstances, the law affords greater privacy protection for financial information about private individuals in City records than for comparable information about City employees; but the general rule is that records of distribution of City funds to private persons, like salary payments to City employees, are subject to disclosure.

Although the comparison is not always exact, usually the types of personal information about employees and officials that the City may not disclose will parallel the personal information about members of the public that the City may not disclose. For example, the general rule is that departments should not disclose home addresses, personal phone numbers, or personal e-mail addresses of members of the public. Such personal contact information implicates the privacy rights of individuals and typically sheds no light on the operations of City government, and thus disclosure does not fulfill the central purpose of public records laws. Further, many individuals would not want their solitude and peace of mind, and in some instances possibly their safety, threatened by unwelcome intrusions derived from public disclosure of their personal contact information. Often the proper balance is to disclose the name of an individual who has communicated with a department, or signed an attendance sheet at a public meeting, while not disclosing contact information for that individual.

But there may be some circumstances in which knowing the location of a person's home is relevant to the public's ability to monitor the operations of government, for example, because of the proximity of the home to a site that is the subject of a City decision. And there may be circumstances where people do not have a reasonable expectation of privacy in contact information they have provided to the City, for example, based on notices on a department's forms or website to the effect that information submitted will be a matter of public record. If a department is inclined to disclose contact information for private individuals or other information about members of the public of a personal nature, we recommend that the department consult the City Attorney's Office.

In some circumstances, especially when disclosure of a personnel record is a close question, it may be advisable as an administrative practice for the City to first notify the affected individuals about the planned disclosure. In rare cases, this process may allow the person to provide information to the department that would cause it to change its decision to disclose. Further, this process allows the affected individuals to attempt to protect their privacy interest by filing suit to prevent disclosure of ostensibly private information.

3. Pending litigation

A department may decline to disclose records relating to and developed during pending litigation to which the City is a party, until the litigation is finally adjudicated or otherwise settled. Cal. Govt. Code § 6254(b). But the City must disclose claims filed against it. Admin. Code § 67.24(b)(1)(i).

As a general rule, for the pending litigation exemption to apply, it is not enough that a record relate to the litigation. Rather, it must have been prepared for or in the course of litigation. Departments receiving requests for records relating to pending litigation should immediately contact the Deputy City Attorney handling the litigation.

4. Attorney-client communication

A department may decline to disclose any privileged communication between the department and its attorneys. State law renders communications made in confidence as part of the attorney-client relationship between the City Attorney's Office and City officials and employees privileged. Cal. Govt. Code §§ 6254(k), 6276.04; Cal. Evid. Code §§ 950 et seq. This privilege extends to all such communications, including those pertaining to open government and conflict of interest/ethics issues, notwithstanding language in the Sunshine Ordinance suggesting the contrary that is superseded by the Charter and state law. *St. Croix v. Superior Court* (2014) 228 Cal.App.4th 434.

The attorney-client privilege belongs to the client, not the attorney. Thus, records in the City Attorney's possession covered by the privilege must remain confidential unless the client – the City – consents to their disclosure. Cal. Bus. & Prof. Code § 6068(e). By the same token, with the City's authorization a department may disclose records in its possession covered by the privilege. But there can be unintended consequences from the release of such records that may adversely affect the City. Accordingly, we recommend that departments consult with the City Attorney's Office before releasing records of privileged attorney-client communications.

5. Attorney work product

Records that contain the work product of an attorney representing the City are protected from disclosure. Cal. Govt. Code §§ 6254(k), 6276.04; Cal. Code Civ. Proc. § 2018.030. The attorney work product doctrine functions as a privilege, protecting from disclosure “[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories.” Cal. Code Civ. Proc. § 2018.030(a). This privilege may also extend to other records relating to the legal work of attorneys representing the City, including documents prepared at the request of the City Attorney's Office, such as reports by investigators, consultants, and other experts.

The attorney work product privilege is distinct from the attorney-client privilege and can cover records that the attorney-client privilege does not. And, unlike the pending litigation exception, the attorney work product privilege extends beyond records prepared for litigation purposes. Where the privilege applies to litigation records, it does not lose its force at the conclusion of litigation.

6. Informants, complainants, witnesses, and whistleblowers

In some circumstances, under the “identity of informer” privilege, departments may shield from disclosure the identity of persons complaining to the City about violations of law. Cal. Evid. Code § 1041. Privacy or other grounds may also authorize or require nondisclosure, even where the complaint does not allege a violation of law. Cal. Govt. Code § 6254(c). Substantial public interests often warrant withholding the identity of informants, complainants, and witnesses. When, for example, a tenant complains about a landlord, a neighbor complains about a neighbor, an employee complains about an employer, or a

citizen complains about a person making a public disturbance, disclosure of the identity of the complainant could lead to retaliation against or harassment of the complainant. Where protecting the identity of an informant, complainant, or witness is warranted, all reasonable redactions may be made to serve that purpose. For example, if the facts of a narrative submitted by a complainant could reveal the complainant's identity, the narrative should be withheld or redacted as necessary to safeguard the complainant's identity.

In some circumstances, the "official information" privilege permits departments to shield from disclosure records of an ongoing investigation where the investigation has been undertaken with an understanding or under established procedures that witness statements and other evidence will be treated as confidential. See generally Cal. Evid. Code § 1040. The rationale for invoking this privilege is that disclosure of investigative records while an investigation is ongoing could compromise the investigation. Records of certain types of investigations may be protected from disclosure under specific provisions of the Public Records Act. Cal. Gov. Code § 6254(c) (personnel investigations); Cal. Gov. Code § 6254(f) (law enforcement investigations). But the official information privilege, in appropriate circumstances, can warrant withholding or redaction of other types of investigative records, including, for example, complaints prompting an investigation and statements of witnesses and others gathered during an investigation.

Also, the City may protect from disclosure the identity of whistleblowers complaining about City officers' and employees' wasteful, inefficient, or improper use of City funds or other improper activities, as well as the content and investigation of those complaints. Charter §§ C3.699-13(a), F1.107(c); C&GC Code §§ 4.120, 4.123. Central to the effectiveness of the City's whistleblower program is the public's understanding that the City will treat whistleblower complaints in a confidential manner, to the extent permitted by law.

Finally, the constitutional right to petition the government for a redress of grievances, or to engage in anonymous protest speech, may in some circumstances protect the identity of complainants.

7. Trade secrets

Under certain circumstances, the law protects trade secrets from disclosure. Cal. Govt. Code § 6276.44; Cal. Civ. Code §§ 3426, 3426.7(c); Cal. Evid. Code § 1060. Different types of information, including proprietary financial data, may constitute a trade secret. Several provisions in the Public Records Act address narrow categories of trade secrets or other proprietary information. See, e.g., Cal. Govt. Code §§ 6254.2 (pesticide safety and efficacy information), 6254.7 (certain air pollution data), 6254.15 (corporate financial information regarding location, expansion, and retention of corporate facilities in California).

But trade secret issues more likely will arise in a variety of business, contractual, and land use contexts not specifically addressed in the Public Records Act. A request for records that a company deems to be trade secrets can pose difficulties for the City, which must evaluate rather than take at face value the company's claim that the records are bona fide trade secrets. In some cases it will be clear that a record is a trade secret; but in many cases it will be unclear. Further, even if a record qualifies as a trade secret, its disclosure is not

necessarily barred in response to a public records request, because the public interest in disclosure of the trade secret must also be considered.

Where the City intends to disclose records that a company claims are trade secrets, it is often appropriate for the City to give the company a brief period within which to seek a judicial order preventing disclosure. A department facing a records request that may contain trade secrets should consult the City Attorney's Office before responding to the request.

8. Investigative and security records

The Public Records Act exempts from disclosure records of complaints to, investigations conducted by, intelligence information or security procedures of, and investigatory or security files compiled by, local police agencies. Cal. Govt. Code § 6254(f). The City must disclose certain information in files covered by this exemption, but not the files themselves. This exemption is potentially broad in scope, covering a wide range of records, including, for example, police investigative files, security tapes of City buildings and other public areas such as parks and plazas, customer lists provided to the police by an alarm or security company, and police protocols for responding to terrorist attacks. Because this is a discretionary exemption, the police agency may, as a matter of practice or policy, choose to disclose records covered by the exemption, unless disclosure would be barred by another provision of law. But certain related information, such as criminal history information, may not be publicly disclosed. See generally Cal. Pen. Code §§ 11105 *et seq.*, 13300 *et seq.* Peace officer personnel records do not fall within this exemption and, as previously noted, may not be publicly disclosed. Cal. Pen. Code § 832.7.

Unlike the vast majority of exemptions, disclosure obligations under this exemption may turn on the identity or purpose of the requester. For example, certain types of information must be disclosed to victims of certain crimes, their authorized representatives, and insurance carriers against which a claim has been or might be made. Other types of information must be disclosed to persons who swear under penalty of perjury that the request is made for scholarly, journalistic, political, or governmental purposes, or for investigation purposes by a private investigator. We do not address all the details of this exemption here, but encourage affected departments to consult the City Attorney's Office as issues arise.

The Sunshine Ordinance has cut back on this exemption. Under the Public Records Act, a record that falls within this exemption remains exempt even after the case is closed. But the Sunshine Ordinance provides, as to records pertaining to criminal investigations, arrests, or other law enforcement activity, that the record becomes available to the public once the District Attorney or a court determines that a prosecution will not be sought or the statute of limitations for filing charges has expired. Admin. Code § 67.24(d). Even so, the Ordinance protects from disclosure certain types of sensitive private information including names of juvenile witnesses and certain information whose disclosure would jeopardize law enforcement, for example, by disclosing a confidential source or secret investigative techniques or procedures, or in other unspecified ways. Admin. Code § 67.24(d)(1)-(6). But a state law enforcement officer such as the District Attorney is not bound by this provision.

This exemption also covers investigatory or security files compiled by non-police agencies for correctional, law enforcement, or licensing purposes. The “law enforcement” feature of this exemption generally precludes its application to records of administrative investigations conducted to determine compliance with ordinances. But measures taken by non-police agencies to deter crime or facilitate apprehension of criminals, such as the use of video surveillance cameras, may produce records that this exemption or the right of privacy protects from disclosure. Further, the exemption for investigatory files that the City compiles for licensing purposes has broad reach given the range of permitting decisions that departments and policy bodies make. A separate exemption covers personal financial data that an applicant submits to qualify for a permit or license. Cal. Govt. Code § 6254(n).

For more information on security matters generally, see the memorandum entitled, “Guidelines for Redacting Information from Plans Created by the City to Anticipate and Respond to Emergencies Created by Terrorist or Other Criminal Activity” (September 15, 2006) on the City Attorney’s website. But the memorandum is only a starting point. The law regarding security-related records is evolving. A specific exemption in the Public Records Act now protects from disclosure an information security record if, on the facts of the particular case, disclosure would reveal vulnerabilities to, or otherwise increase the potential for an attack on, an information technology system of the City. Cal. Govt. Code § 6254.19.

9. Other exemptions

The Public Records Act creates many other exemptions for specific types of records, including, as previously noted, certain types of trade secrets. Among other exemptions the Act creates are records containing test information pertaining to applications for public employment, Cal. Govt. Code § 6254(g); real estate appraisals and engineering evaluations, Cal. Govt. Code § 6254(h); library circulation records, Cal. Govt. Code § 6254(j); records containing certain voter registration information, Cal. Govt. Code § 6254.4; records containing utility customer data, Cal. Govt. Code § 6254.16; and records of “alternative investments” made by public investment funds, Cal. Govt. Code § 6254.26. There are many more exemptions, often narrow in scope and obscure.

These exemptions may be detailed, with multiple components that must be analyzed closely to determine whether the exemption applies to a particular record, whether the exemption is mandatory or discretionary, and whether there are factors that must be balanced before making the decision to disclose or withhold the record.

Sometimes departments have legitimate programmatic or policy concerns with disclosing a record, but are not aware of an applicable exemption. In these circumstances, consultation with the City Attorney’s Office is appropriate. Given the emphasis on disclosure in our public records laws, there may be no applicable exemption. But in some cases there may be an exemption that is available to address the department’s concerns.

E. Contracts and related records

The Sunshine Ordinance sets forth detailed rules governing disclosure of contracts and related materials. The City must disclose such records at least to the extent required by the Public Records Act. But in certain respects the Ordinance affords the public greater access to these records than does State law.

We summarize below the general disclosure rules applicable to contracts and related materials, and then discuss special rules that apply to sole source service contracts, certain leases and permits, and franchise agreements. Given the variety and in many cases the complexity of City contracts, questions may arise that we do not answer below. For those, we recommend that departments consult the City Attorney's Office.

1. General rules

a. Mandatory post-award disclosure

Except as noted below, contracts, contractors' bids, responses to requests for proposals ("RFPs"), and all other records of communications between departments and persons or firms seeking contracts must be available for public inspection immediately after the City awards the contract. Admin. Code § 67.24(e)(1). When a department receives proposals in response to an RFP, but does not award a contract, it is not required to make the proposals public. But if a board or commission is sitting as the review panel, and for that purpose receives copies of one or more proposals submitted in response to an RFP, then the proposals must be made available to the public at the same time they are made available to the commissioners. Cal. Govt. Code § 54957.5; Admin. Code § 67.9.

Though not specifically mentioned in the Sunshine Ordinance, responses to requests for information ("RFIs") and requests for qualifications ("RFQs") are subject to the same general rules for disclosure. Because responses to RFIs and RFQs typically precede the issuance of an RFP, those responses typically will be considered communications between the City and persons or firms seeking contracts, and may be withheld from disclosure prior to contract award. But where the end result of an RFQ is the establishment of a list of qualified contractors to perform specialized services for a department on an ad hoc basis, the establishment of the list should be analogized to the award of a contract.

As the prior discussion suggests, questions may arise concerning the timing of disclosure of those responses and other records relating to the responses. Where such questions arise, we recommend that departments consult the City Attorney's Office.

b. Notice of disclosure requirements

The Sunshine Ordinance requires departments to inform bidders, proposers, and contractors that contract-related information they provide to the City will be subject to public disclosure on request, including, as discussed below, financial information the successful bidder or proposer submitted. Admin. Code § 67.24(e)(1).

c. Financial data

Departments may refuse to disclose proprietary financial information in records regarding an unsuccessful bidder or proposer including information on net worth. Admin. Code § 67.24(e)(1). Departments may withhold proprietary financial data about the winning bidder or proposer until the final approval authority in the City awards the contract. Admin. Code § 67.24(e)(1). Departments must make such information public upon award of the contract, unless other State or federal law prohibits such disclosure. Admin. Code § 67.24(e)(1). In some instances (for example, under the federal Transportation Regulations for Disadvantaged Business Enterprises), State or federal law may forbid the City from disclosing the personal net worth and related records of successful bidders or proposers.

d. Records relating to negotiation strategy

As a general rule, departments may withhold from disclosure preliminary drafts, memoranda, notes, and other records containing recommendations relating to the City's negotiating strategy, that the City has not provided to a prospective contractor or other third party. See generally Admin. Code §§ 67.24(a)(1), 67.24(e)(1), 67.24(e)(3). Disclosure of such records to the public would mean that the party or parties with whom the City is negotiating may also obtain copies. The Sunshine Ordinance does not mandate such disclosures.

e. Score sheets and other evaluation materials for proposals

The Sunshine Ordinance mandates disclosure of certain records relating to RFPs. After completion of any review, evaluation, or rating of responses to an RFP, the City must make available for public inspection the names of scorers and evaluators, with their individual ratings, comments, and score sheets, and other materials used in the evaluation process. Admin. Code § 67.24(e)(1). The proposals that the panelists evaluate are not considered "other materials used in the evaluation process" and thus need not be disclosed at this stage in the contracting process. Proceedings of RFP selection panels are closed to the public.

f. Draft contracts

Except for certain types of agreements as discussed below (see section (E)(2)), departments may refuse to disclose draft versions of contracts during the negotiating process. But they must preserve these drafts and make them available for public inspection 10 days before presentation of the agreement to the policy body responsible for approving the agreement. Admin. Code § 67.24(a)(2). The 10-day rule does not apply where the policy body finds and articulates how the public interest would be unavoidably and substantially harmed by compliance with that rule. Admin. Code § 67.24(a)(2). Further, in the case of negotiations for a contract, lease, or other business agreement in which a City agency is offering to provide facilities or services in direct competition with other public or private entities that are not required to or do not make their competing proposals public, the policy body may postpone public access to the final draft agreement until the City agency presents the draft to it for approval. Admin. Code § 67.24(a)(2).

g. Other exemptions

Departments are not required to disclose contract-related records that federal or State law protect from disclosure or that fall within specific exemptions under the Public Records Act and Sunshine Ordinance. For example, privileged attorney-client communications, even if contract-related, are not subject to disclosure. As another example, an internal draft of an RFP that has not been finalized may be withheld from disclosure as a "recommendation of the author" where its premature disclosure would impair the integrity of the contracting process. See generally Cal. Govt. Code § 6254(a); Admin. Code § 67.24(a)(1).

2. Sole source service contracts, certain leases and permits, and franchise agreements

Special rules govern disclosure of records exchanged between the City and another party during negotiation of the following types of contracts:

- Contracts for personal, professional, or other contractual services – if not subject to a competitive process, or where such process has arrived at a stage where there is only one qualified responsive bidder.
- Leases or permits – having total anticipated revenue or expense to the City of \$500,000 or more, or for a term of 10 years or more.
- Franchise agreements.

For these types of contracts (informally referred to as the “Big Three”), departments must make available to the public upon request documents exchanged during negotiations relating to the positions of the parties, including drafts or portions of drafts of agreements, even if the request is made while negotiations are ongoing. In other words, the general rule discussed above, that departments may refuse to disclose draft versions of contracts during the negotiating process, does not apply to these types of contracts. If the City does not prepare a record of the negotiations, or the record does not provide a meaningful representation of the positions of the parties, then the Deputy City Attorney or other City representative familiar with the negotiations, upon written request from a member of the public, must prepare a written summary of the respective positions of the parties in the negotiations. The summary must be prepared within five business days of the final day of negotiations for the week. Admin. Code § 67.24(e)(3).

F. Enhanced access to public records under the Sunshine Ordinance

The Sunshine Ordinance limits the ability of City departments to invoke certain exemptions available under the Public Records Act and requires disclosure of certain types of records. We discuss below major features of the Ordinance that provide enhanced access to public records and that are not discussed elsewhere in this Guide.

1. General balancing

In addition to enumerating specific exemptions, the Public Records Act includes a general catch-all “public interest” balancing exemption. This exemption allows the government agency to refuse to disclose records where, on the facts of the particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Cal. Govt. Code § 6255(a). The Sunshine Ordinance prohibits the City from withholding or redacting records under this balancing exemption. Admin. Code § 67.24(g).

Some exemptions have a balancing component, whether explicit or implicit. For example, the privacy exemption in the Public Records Act covers only “unwarranted” invasions of personal privacy. Cal. Govt. Code § 6254(c). Thus, this exemption necessarily entails drawing lines between warranted and unwarranted invasions of privacy, which forces consideration of the public interest that would be served by disclosure of information that has a privacy dimension. That is a form of balancing, but the Sunshine Ordinance does not prohibit it. Other examples of exemptions on which the City may rely that necessitate a balancing component include the official information privilege and the identity of informer privilege. Cal. Evid. Code §§ 1040(b)(2), 1041(b)(2).

2. Deliberative process privilege

Under the general public interest balancing exemption of the Public Records Act, an agency may decline to disclose records based on the “deliberative process privilege.” This privilege applies where the agency can demonstrate that disclosure of records would discourage candid discussion in the agency, undermining its decision making process and its ability to perform its functions. The Sunshine Ordinance prohibits the City from withholding or redacting records based on this privilege. Admin. Code § 67.24(h).

3. Investigative records exemption

As noted earlier, the Sunshine Ordinance limits the “investigative records” exemption of the Public Records Act, Section 6254(f), as it pertains to criminal investigation records. With certain qualifications, those records lose their exempt status once it has been authoritatively determined that a prosecution will not be sought or once the statute of limitations has expired. Admin. Code § 67.24(d).

4. Budget and financial records

The Sunshine Ordinance requires the City to disclose budgets, whether tentative, proposed, or adopted, for the City or any department, program, project, or other category. Admin. Code § 67.24(f). The City must disclose all bills, claims, invoices, vouchers, or other records of payment obligations, and records of actual disbursements, showing amount paid, payee, and purpose of payment. But records of payments for social or other services that state or federal law makes confidential are exempt from disclosure. Admin. Code § 67.24(f).

5. Confidential litigation settlements prohibited

The Sunshine Ordinance prohibits the City from entering into confidential settlements of litigation. Admin Code § 67.12(b)(3).

G. Additional public information requirements

The Sunshine Ordinance and other provisions of City law enhance transparency in government by requiring City officials and employees to follow certain practices that facilitate the public's access to information. We highlight below the major provisions relating to operational transparency that this Guide does not discuss elsewhere.

1. Oral public information

Each department head must designate one or more knowledgeable persons to answer questions regarding departmental operations, plans, policies, and positions. Admin. Code § 67.22(a). The department head may but is not required to serve in this capacity. Admin. Code § 67.22(a). The designated person must respond to inquiries, provided that no more than 15 minutes is required to obtain the information responsive to the inquiry. Admin. Code § 67.22(c). The department head should assure that someone is always available to provide oral information to the public.

Both the U.S. and California Constitutions provide for the right of the people to petition their government for redress of grievances, and practitioners of good government should make every effort to be accountable and responsive to the citizens they serve. But neither these constitutional guarantees nor the Sunshine Ordinance gives members of the public the right to interview, debate, or engage in lengthy discussions employees or officials of their choosing. At the same time, none of these laws curtails informal informational discussions between employees and members of the public, if such contacts are acceptable to the employee and the department, do not disrupt departmental operations, and do not violate other laws, such as those governing public meetings. Admin. Code § 67.22(b).

2. Public review file

The Clerk of the Board of Supervisors and the clerk or secretary of each board and commission enumerated in the Charter must maintain a public review file open for public inspection during normal business hours. Admin. Code § 67.23(a). This requirement does not apply to other policy bodies. The public review file must contain copies of communications that the clerk or secretary has distributed to or received from a quorum of the body concerning any matter on its meeting agendas within the previous 30 days or likely to be on a meeting agenda of the body within the next 30 days. Admin. Code § 67.23(a). This requirement does not apply to exempt materials, commercial solicitations, or periodical publications. Admin. Code § 67.23(a). The clerk or secretary should take care to ensure that such records are redacted or, as appropriate, not included in the file, to protect information that is privileged or otherwise confidential.

The clerk or secretary must maintain the public review file in chronological order for communications sent or received in the immediately preceding three business days. Admin. Code § 67.23(b). After a document has been on file for two days, it may be removed and placed in the monthly chronological file. Admin. Code § 67.23(b). The clerk or secretary need not put lengthy, multi-page reports attached to these communications in the chronological file if the file contains a letter or memorandum of transmittal referencing the report. Admin. Code § 67.23(c).

3. Annual reports

City boards, commissions, and departments must prepare an annual report. Charter § 4.103; Admin. Code §§ 1.56(a), 2A.30. The annual report should contain a summary of the services and programs of the board, commission, or department, presented in terms and format accessible to the average citizen, and may include highlights and achievements of the prior year. Admin. Code § 1.56(a). Unless the annual report is 10 pages or less in length, multiple paper copies of the report should not be produced without the approval of the City Administrator, with the exception that paper copies may be produced for distribution to members of the public and members of a policy body in connection with a meeting of the body. Admin. Code § 8.12.5.

Boards, commissions, and departments that produce an annual report must post it on the City's website and transmit the Uniform Resources Locator (URL) to the Public Library within 10 days of final approval of the report. Admin. Code § 1.56(b). In addition, if the annual report is 10 pages or less in length, two hard copies of the report should be filed with the Public Library. Admin. Code § 8.16. Where the law does not set the date for submitting the report, the board, commission, or department must notify the clerk of the Board of Supervisors in writing of the date by which the report will be posted. Admin. Code § 1.56(c).

4. Annual lists of sole source contracts

At the end of each fiscal year, departments must provide to the Board of Supervisors a list of all sole source contracts that they entered into during that fiscal year. Admin. Code § 67.24(e)(3). The list is a public record available for inspection and copying.

5. Calendars for the Mayor, department heads, and members of the Board of Supervisors

Under the Sunshine Ordinance, the Mayor, each member of the Board of Supervisors, and every department head—whether elected or appointed—must prepare and keep a daily calendar. Admin. Code § 67.29-5. Officials must complete the required entries within three business days after the meeting or event takes place. An official must keep a copy of the daily calendar for two years after the date of the meeting or event, unless the department's record retention policy mandates a longer retention period.

Generally, the daily calendar must include every meeting or event that the official attended in person, by teleconference, or by other electronic means, such as Skype. There are two exceptions to this requirement:

- The calendar need not include purely personal or social events, provided that (1) no City business is discussed, and (2) the event does not take place at City offices or at the office or residence of a person who does substantial business with the City or is substantially financially affected by City actions. This exception applies to all officials who must keep and maintain a daily calendar.
- Consistent with the general exception described above, the ordinance provides more specific exceptions for members of the Board of Supervisors. Board members' calendars need not include (1) meetings or events where City business is discussed only incidentally; (2) unplanned, casual conversations with residents; (3) campaign-related meetings, events, and appearances; or (4) meetings or events where all attendees are Board members, legislative aides, or employees of the Office of the Clerk of the Board.

For each entry, the daily calendar must include:

- The time of the meeting or event;
- The place of the meeting or event;
- A general statement of the issues discussed, as long as the information is not confidential or privileged as a matter of law. If a recording of the meeting or event is available to the public (for example, a public Board meeting), then the official is not required to include a statement of issues discussed; and
- Names of attendees and the organizations they represent, as specified below.

For meetings with more than ten attendees, names of the attendees and the organizations they represent need not appear on the daily calendar. For meetings with ten or fewer attendees, the calendar must include names of the individuals present and the organizations they represent, if known to the official. The calendar need not include names of individuals and organizations at meetings where:

- Disclosure would reveal confidential information protected by other laws, such as (1) the identity of a confidential whistleblower, (2) personnel information, (3) the identity of a person petitioning the government where the individual has reasonably sought and been assured confidentiality, and (4) the identity of union members or representatives at a meeting to discuss matters within the scope of representation;
- City business is discussed only incidentally;
- The meeting is an unplanned, casual conversation with residents;
- The meeting is campaign-related; or
- All attendees are employees or officers in the official's City department.

When calculating how many people attended a meeting, all attendees other than the official preparing the calendar entry should be counted.

The official must make a good faith effort to identify the individuals at the meeting and the organizations they represent. The official can meet this obligation by asking attendees to

identify themselves at the meeting, circulating a sign-in sheet, or asking the person who organized the meeting to prepare a list. While the official should ask all attendees to identify themselves, the official need not require disclosure unless the official knows that the attendees fall into one of the following categories:

- Lobbyists, campaign consultants, or permit consultants registered with the Ethics Commission;
- Employees or representatives of an entity that has received a grant from or entered into a contract with any City department within the previous 12 months; or
- Sponsors for a development project for which the Planning Commission or another City agency has certified an environmental impact report and that has estimated construction costs exceeding \$1,000,000.

If attendees do not sign in or disclose their identities, the official should nonetheless include that information on the daily calendar if the official knows the identities of attendees or the organizations they represent, as long as this disclosure would not reveal confidential information.

The calendar requirement imposed by the Sunshine Ordinance is limited to individuals holding specified positions. There is no calendar requirement that applies to all City employees and officials. But if an official or employee maintains a personal work calendar, it would be considered a public record, with exempt material subject to redaction.

6. Maintaining a website

Departments must maintain a publicly accessible website. Admin. Code § 67.29-2. Each department must post on its website the following information for all of its policy bodies (including but not limited to all boards and commissions, whether or not Charter-created, committees of policy bodies, and advisory bodies):

- Notices and agendas for meetings of policy bodies, posted no later than the time at which this information is otherwise distributed to the public, allowing reasonable time for posting.
- Minutes of meetings within 48 hours after they have been approved. This requirement does not impose a duty to keep minutes on policy bodies that are not required to keep minutes.
- All notices, agendas, and minutes of meetings of policy bodies. This requirement does not impose a duty to keep minutes on policy bodies that are not required to keep minutes.
- Information that the policy body or department is required to make publicly available.

Each department must make reasonable efforts to review its website regularly and update it at least weekly. Admin. Code § 67.29-2. The Sunshine Ordinance encourages departments

to make available on their respective websites as much information and as many documents as possible concerning their activities. Admin. Code § 67.29-2.

In addition, the City must post on the City's website (or comparable accessible location on the internet) a current copy of the Charter and all City codes. Admin. Code § 67.29-2.

IV. Records retention and destruction laws

Various local, state, and federal laws govern the retention and destruction of records. We summarize the most important requirements below. Department heads should familiarize themselves with the records retention requirements in Chapter 8 of the San Francisco Administrative Code and in the Sunshine Ordinance, as well as with rules relating to particular departmental records.

The purpose of the records classification and retention laws is twofold. First, to preserve important records for an appropriate period of time in an orderly fashion. Retention ensures both that the public has access to important City records and that the City is able to protect its legal and financial rights by accessing records that establish or define those rights. Second, a carefully considered retention policy obviates the need of a department to retain unnecessary records and incur unnecessary storage costs. Accordingly, each department must develop a written policy specifically outlining which records it must maintain, and for how long.

A. Definition of 'records' that must be retained

For the purpose of records retention law, the term "records" is defined much more narrowly than in the Public Records Act. In the retention context, "records" means any paper, book, photograph, film, sound recording, map, drawing, or other document, or any copy, made or received by the department in connection with the transaction of public business and retained by the department (1) as evidence of the department's activities, (2) for the information contained in it, or (3) to protect the legal or financial rights of the City or of persons directly affected by the activities of the City. Admin. Code § 8.1.

E-mail and other electronic records are subject to the records retention laws. As with paper records, some electronic records fit the definition of "records" in the retention context. But most do not.

The vast majority of public records in the City's possession do not fall under the definition of "records" within the meaning of records retention law. Therefore, the City may destroy these records at any time. For example, as a general rule, employees may immediately dispose of phone message slips, notes of meetings, research notes prepared for the personal use of the employee creating them, and the large majority of e-mail communications.

In addition, departments may destroy at any time periodicals or publications they receive that are not of historical significance. They likewise may destroy duplicate copies even of documents the original copy of which the responsible City department must retain under records retention law. Cal. Govt. Code § 34090.7. With the exception of certain draft

agreements, departments generally need not retain drafts of documents that later drafts or a final version supersede.

B. Classification of records that must be retained

All records that are subject to records retention requirements fall into three classifications – Current, Storage, and Permanent – as described below.

- **Current Records:** Records that the department retains in its office space and equipment for convenience, ready reference, or other reason.
- **Storage Records:** Records that the department need not retain in its office space and equipment but that the department must, or should, prudently preserve for a time or permanently in the facilities of a records center.
- **Permanent Records:** Records that the department must permanently retain.

Admin. Code § 8.4. The department head is responsible for determining which types of departmental records properly fall under each of these classifications. Admin. Code § 8.3.

Departments must also designate certain records as “Essential Records” – essential to the continuity of government and the protection of rights and interests of individuals in case of possible destruction by a major disaster, such as fire, earthquake, flood, enemy attack, or other cause. Admin. Code § 8.9.

C. The records retention schedule

State law sets a floor for records retention. The general rule is that departments must maintain all records subject to records retention requirements for at least two years. Cal. Govt. Code § 34090. Again we note that this requirement applies only to the minority of records in the possession of most City departments that are subject to any retention requirements. There are certain exceptions to the two-year State law standard, requiring records to be maintained for a longer period or permitting their destruction in a shorter period.

Consistent with State law, City law sets the following schedule for how long records must be retained.

Current records and storage records—from two to five years old. Departments may destroy or otherwise dispose of these records if (1) their destruction will not be detrimental to the City or defeat any public purpose, and (2) a records retention schedule includes a definitive description of such records and sets forth the retention period applicable to them. The department head must prepare the schedule. The Mayor or Mayor’s designee, or the board or commission that oversees the department, must approve the schedule. Further, the City Attorney must approve the schedule as to records of legal significance, the Controller must approve it as to financial records, and the Retirement Board must approve it as to time rolls, time cards, payroll checks, and related matters. Admin. Code § 8.3.

Current records and storage records—over five years old. Departments may destroy these records if they have served their purpose and are no longer required for any public

business or other public purpose. But departments may destroy financial records only after the Controller's approval; legally significant records only after the City Attorney's approval; and payroll checks, time cards, and related documents only after the Retirement Board's approval. Departments must deliver payroll checks, time cards, and related documents to the Retirement Board upon its request instead of destroying them. Admin. Code § 8.3.

Permanent records and essential records. Departments may not destroy or otherwise dispose of these records, except as stated here. Admin. Code § 8.3. Unless otherwise required by law or regulation, the City must store permanent records by microfilming the paper records or placing them on an optical imaging storage system, placing the original film or tape in a State-approved storage vault, and maintaining a copy with the department. Admin. Code § 8.4. The department, at its discretion, may then destroy the paper records.

D. Other principles pertaining to retention of records

In addition to specific retention requirements imposed by state and local law, as discussed above – including the Sunshine Ordinance, discussed more fully below – general legal principles require retention of records in some circumstances.

1. Retention following a public records request

Even if a document does not meet the definition of “record” for retention purposes, if the department receives a public records request for the document, it may not destroy it or otherwise dispose of it. For example, if a third party submits a document to a department that later receives a records request for it, the department may not return the document to the third party and then tell the requester it does not possess the document. The legal obligation to respond to public records requests and provide responsive records unless there is a legal basis for withholding them precludes the department from destroying or disposing of a document after receiving a public records request for which the document is a responsive record.

The same principles apply if a document meets the definition of “record” for retention purposes but due to the passage of time could have been destroyed under the applicable records retention schedule. If the document is in the department's possession at the time of the public records request, then the legal obligation to respond to the request trumps the discretion the department otherwise would have to destroy the document.

2. Retention in light of litigation risk

If a matter is likely to be the subject of litigation or is covered by pending litigation, then departments and officials with records relevant to the litigation must retain the records. This retention, called a “litigation hold,” applies to both paper and electronic records. The same principle applies if litigation has commenced.

3. Method of retaining electronic records

If a department elects to or must retain a particular e-mail, it must create and retain a hard copy in the appropriate file. In the alternative, a department with a reliable computer data storage and retrieval system may elect to store the document on that system. Departments may not rely on e-mail backup tapes to comply with City and State record retention laws.

E. Sunshine Ordinance provisions

The Sunshine Ordinance addresses certain records retention issues, as discussed below.

1. The general duty to maintain and preserve records

The Mayor and all department heads must maintain and preserve all documents and correspondence in a professional and businesslike manner. Admin. Code § 67.29-7(a). This does not mean that a department must retain all its records. Rather, institution of and compliance with the department's records retention policy satisfies this provision.

2. Designation of certain officials' records as city property that remains with the city

Documents that the Mayor's Office, elected officials, or department heads prepare, receive, or maintain are the City's property. The City must maintain the originals of such records consistent with record retention policies, even after the official leaves the office. Admin. Code § 67.29-1.

3. Duty to cooperate with City Administrator in compiling city index

The Sunshine Ordinance requires the City Administrator to compile an index that identifies the types of information and documents the City's departments, agencies, boards, commissions, and elected officials maintain. The index is for the use of City officials, staff, and the public. It should be organized to permit a general understanding of the types of information the City maintains, by which officials and departments, for which purposes, for what periods of retention, and under what manner of organization for accessing.

The City Administrator must continuously and accurately maintain the index. Each department, commission, and public official must cooperate with the City Administrator to identify the types of records it maintains, including those documents created by the entity, those documents it receives in the ordinary course of business, and the types of requests that it regularly receives. Each department, agency, commission, or public official shall report any changes in practices or procedures affecting the accuracy of the index. Admin. Code § 67.29.

4. Specific retention requirements

The Sunshine Ordinance requires retention of certain records. For example:

- Departments must retain for public review, before approval by a policy body, drafts of agreements City representatives are negotiating with another party that have been exchanged with that party. Admin. Code § 67.24(a)(2).
- Policy bodies must permanently retain tapes of their meetings, regardless of whether the body was required to tape the meeting. Admin. Code §§ 67.14(b), 67.8-1(a).
- The Department of Elections must preserve all records and invoices relating to the design and printing of ballots and other election materials, as well as records documenting who had custody of ballots from the time ballots are cast until they are received and certified by the department. Admin. Code § 67.29-7(b).
- Charter boards and commissions must retain for at least 30 days written materials that must be included in the public review file. Admin. Code § 67.23.

Some of these retention requirements are discussed in greater detail elsewhere in this Guide.

V. Public meeting laws

A. Entities subject to public meeting laws

1. Legislative or policy bodies

The Brown Act applies to “legislative bodies.” Generally, the Act defines a legislative body as any local government board, commission, committee, or other body, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. Cal. Govt. Code § 54952(b). The governing body of a local agency or local body created by state or federal statute also is a legislative body. Cal. Govt. Code § 54952(a).

The Sunshine Ordinance applies to “policy bodies.” Its definition of “policy body” is similar to but broader than the Brown Act definition of “legislative body.” In our discussion of open meeting laws, we use the term “policy body” to encompass all of these entities under the Sunshine Ordinance and all legislative bodies under the Brown Act.

Policy bodies include the City’s boards and commissions, any advisory body created by the Charter or the Board of Supervisors or by the initiative of a board, commission, or other policy body, any committee of a policy body, and any advisory board, commission, committee, or council created by federal, state, or local grant whose members are appointed by City officials, employees, or their agents. Admin. Code § 67.3(d). Bodies created by the Mayor or a department head are not policy bodies but in some circumstances may be “passive meeting bodies,” discussed at subsection (I) below.

Committees consisting solely of City employees or officials that are created by Charter, ordinance, resolution, or formal action of a policy body are policy bodies. Admin. Code § 67.3(d)(6). Other committees not so created consisting solely of City employees are not policy bodies, but in limited circumstances may be passive meeting bodies.

Policy bodies often create other policy bodies through formal action. For example, if a commission's bylaws create a committee, or the commission adopts a motion doing so, the committee is itself a policy body. It matters not whether the body is an ad hoc committee or a permanent committee.

Policy bodies may also create other policy bodies through less formal means. For example, if, acting on behalf of the commission, the chair forms an ad hoc committee, the committee may be a policy body even though the commission did not formally create it. As another example, if a commission agrees by consensus at a meeting that two commissioners should look into an issue and report back at a later meeting, the commission may, depending on the circumstances, have created a two-member policy body, without knowingly doing so.

The name of an entity does not determine whether it is a policy body. Even if labeled a “task force,” “working group,” or similar title connoting informality in operations, the entity is a policy body if it meets the legal definition. So too is a personnel or budget committee of a commission, even if it only makes recommendations, or only investigates certain issues. Indeed, a “policy” body need not make or even advise on policy. For example, a body that primarily performs managerial tasks, or mainly adjudicates cases, is a policy body if it meets the legal definition.

Different types of policy bodies are subject to most of the same meeting law requirements. But there are important variations in requirements for different types of policy bodies. For example, in some circumstances special, more stringent open meeting requirements govern the Board of Supervisors and boards and commissions created in the Charter but do not apply to non-Charter bodies. And policy bodies such as the Board of Appeals conducting adjudicatory proceedings must also provide procedural due process that does not emanate from open government laws. In this Guide, we note several differences in open meeting requirements that hinge on the type of policy body involved, but does not detail all such differences.

2. Passive meeting bodies

The Sunshine Ordinance imposes limited public access requirements on “passive meeting bodies” that do not qualify as policy bodies. See subsection (I) below.

3. Private entities

In certain circumstances, City law requires private entities that perform the City’s business or contract with or receive funds from the City to provide public access to certain of their meetings. See Section VII below.

4. Individuals

Because a policy or passive meeting “body” must consist of two or more members, an individual can be neither a policy body nor a passive meeting body. Thus, generally, neither the Brown Act nor the open meeting provisions of the Sunshine Ordinance apply to meetings or hearings conducted by individuals, such as:

- An executive official, including a department head who serves under a board or commission.
- An individual hearing officer, even if the hearing officer is performing a function for a board or commission.
- An individual member of a policy body, even if the member is performing an assigned function for the body.

For example, if a policy body assigns one member to research an issue and report back to the body, the member need not conduct the research through meetings that conform to the open meeting requirements applicable to the policy body. But to avoid an unlawful seriatim meeting, discussed at Section IV(B)(4)(a) below, the member must take care to avoid interactions outside of noticed meetings that involve a majority of the policy body or one of its committees.

While an individual is not subject to open meeting requirements that apply to a “body,” other laws may require individual officials to conduct public meetings or hearings. For example, certain provisions of law, such as Charter section 16.112, discussed at Section VI(A) below, and Charter section 4.104(a)(1), discussed in Part One, Section VII(B), may require department heads to hold public hearings when considering particular actions, but such hearings are not subject to the rules that govern the meetings of policy bodies. In addition, in limited circumstances, the passive meeting body rules may apply to meetings that executive officials attend.

5. Officials who have not assumed office

A person who has been elected to serve as a member of a policy body but has not yet assumed office must follow the Brown Act. Cal. Govt. Code § 54952.1. An appointed official who has not yet assumed office is not subject to this rule, but may voluntarily choose to adhere to it.

6. ‘Meeting’ defined

The Brown Act and Sunshine Ordinance apply to all “meetings” of policy bodies. When members of a policy body are not engaged in a “meeting,” they generally are not subject to open meeting requirements.

7. The concept of a ‘meeting’

With limited exceptions, under the expansive language of the Sunshine Ordinance, a meeting occurs whenever a majority of the members of a policy body come together at the same time

and place. Admin. Code § 67.3(b)(1). The majority is calculated with reference to all seats on the body, including vacant seats. But if a policy body has seats for nonvoting members, those seats are not considered in calculating the majority.

A meeting occurs even if the policy body takes no action but only gathers information collectively or discusses an issue.

A meeting may also occur under certain circumstances even if a majority of the members are not physically together at the same time and place. The most prominent example is the unlawful “seriatim” meeting. See Section IV(B)(4)(a) below.

8. Examples of meetings

Formal meetings of policy bodies are easily recognized as meetings. Less obvious examples, discussed below, illustrate the breadth of the “meeting” concept under the Brown Act and Sunshine Ordinance.

a. Retreats

Policy bodies may hold retreats. While there may be departures from some meeting norms at retreats, there may be no abandonment of legal requirements. For example, a commission cannot hold a retreat closed to the public in the hope that the private setting will enable members to develop closer personal relationships that may lead to better working relationships. A retreat is a meeting of the body, and therefore must be conducted publicly. There must be proper notice, an agenda, and an opportunity for the public to comment, and all other requirements applicable to meetings must be followed. For example, where a policy body holds a retreat at a location other than its regular meeting place, it must give 15 days’ advance notice. Admin. Code § 67.6(f). And, except in very limited circumstances, policy bodies must hold retreats, like meetings generally, in San Francisco. Cal. Govt. Code § 54954(b); Admin. Code § 67.6(b).

b. Site visits

Policy bodies may undertake site visits, such as inspection of a City facility under the body’s jurisdiction. But a site visit is a meeting of the body and thus must be conducted with proper notice, an agenda, and an opportunity for the public to attend and comment, and must comply with other requirements for meetings. Further, a site visit typically is a special meeting held at a location other than the body’s regular meeting place, so 15 days’ advance notice is required. Admin. Code § 67.6(f). The logistical difficulties that open meeting requirements can pose for site visits may persuade the policy body to forego site visits and instead have a staff member make the visit, perhaps even videotaping it, and then report to the body on the visit at the next meeting of the body.

c. Meal gatherings

The Sunshine Ordinance provides that a “meal gathering” of a policy body before, during, or after a meeting is considered part of that meeting. Admin. Code § 67.3(b)(4)(C). Such a gathering is subject to the applicable notice and agenda provisions of the Ordinance. For

example, if, after a policy body's meeting ends, the members go to a nearby restaurant to unwind over dinner or drinks, their meal gathering is unlawful unless it has been publicly noticed in accordance with the Sunshine Ordinance. Further, the public must be permitted to hear and observe the discussion of the members of the body at a meal gathering. And the body may not conduct a meal gathering in restaurants or other venues that require a payment to gain access.

For purposes of this Sunshine Ordinance provision, a meal gathering encompasses not only provision of a full meal, but also service of beverages or snacks only.

Where a meal attended by a majority of a policy body is not close in time to a formal meeting of the body, the facts will dictate the applicability, if any, of open meeting requirements. As explained below, depending on the facts, such a meal may constitute a meeting of the body, or a non-meeting, or a passive meeting.

9. Non-meetings

The Sunshine Ordinance's expansive definition of a meeting should not be construed so literally as to yield absurd results. For example, during a recess of a meeting of a three-member committee, there is no unlawful "meeting" if two of the committee members find themselves in the same elevator, provided they do not then discuss committee business.

As previously discussed, a "meeting" of a policy body is defined by reference to a majority of its members. When a minority get together or otherwise communicate among themselves regarding matters within the jurisdiction of the body, there is no "meeting." For example, no meeting occurs if two members of a five-member policy body get together to strategize about items on the agenda for an upcoming meeting of the body. Nor is there a meeting if the chair of a five-member body reviews agenda items with the newest member but neither the chair nor the new member reviews those items with other members.

In addition, the law recognizes certain circumstances, discussed below, that do not constitute a meeting of the policy body even though a majority of the members gather together or engage in communications on the same subject.

a. Individual contacts between 'another person' and a majority of members

Individual communications between a person who is not a member of a policy body and a member are not a meeting of the body, even if the person cumulatively has contacts or conversations with a majority of the members on the same subject. Cal. Govt. Code § 54952.2(c)(1); Admin. Code § 67.3(b)(4)(A). This principle recognizes that members of the public have a constitutional right to communicate with all members of policy bodies. In addition, allowing individual communications with a majority of the body gives persons who are not members of either the body or the public, such as staff and other public officials, flexibility one-on-one to answer questions from or provide information to members of the body.

But to avoid the pitfalls associated with unlawful seriatim meetings, discussed at Section IV(B)(4)(a) below, these individual communications must be carefully conducted. The discussions must not involve the views or positions of other members of the policy body on the same subject. The member of the policy body should not solicit or encourage the other person to restate the views of other members, and should curb any such discussion initiated by the other person; and staff communicating with a member of a policy body should likewise avoid stating the views of other members. Cal. Govt. Code § 54952.2(b)(2); Admin. Code § 67.3(b)(4)(A). More fundamentally, those having the individual contacts must not serve as intermediaries to facilitate communications among a majority of the members of the body outside of a meeting.

Special limitations apply to adjudicative matters, such as a specific permitting or personnel decision that affects an individual's rights. Depending on the circumstances, principles of due process and procedural and evidentiary rules governing such matters may make decisions of the body vulnerable to legal challenge where members have had individual conversations with anyone regarding the matter outside of the hearing. Although the Brown Act and Sunshine Ordinance generally allow individual communications with a majority of a policy body, those laws do not address the principles and rules that specifically apply in adjudicative settings.

b. Attendance at social, ceremonial, or recreational gatherings

Attendance of a majority of members of a policy body at a social, ceremonial, or recreational gathering is not a meeting if (1) the gathering is not sponsored or organized by or for the policy body and (2) a majority of the members refrain from using the occasion to discuss business within the subject matter jurisdiction of the body. Cal. Govt. Code § 54952.2(c)(5); Admin. Code § 67.3(b)(4)(C). For example, attendance of a majority of a policy body at a wedding, swearing-in ceremony, or banquet honoring a community leader would typically not be a meeting of the body.

But if a social, ceremonial, or recreational gathering is sponsored or organized by or for the policy body and a majority of members are invited to attend, the event is a gathering of a passive meeting body. See Section IV(I) below. And if a majority of the members discuss the business of the policy body at a social, ceremonial, or recreational gathering, that discussion transforms the gathering into a meeting of the body – an unlawful meeting, because not held in compliance with open meeting requirements.

c. Attendance at conferences

Attendance of a majority of members of a policy body at a regional, statewide, or national conference, such as an educational conference, is not a meeting of the body, provided that a majority do not use the occasion to collectively discuss the topic of the gathering or other business. Cal. Govt. Code § 54952.2(c)(2); Admin. Code § 67.3(b)(4)(B). The conference must be open to the public, but members of the public have no right to attend for free if other participants or registrants must pay fees or other charges to attend. Cal. Govt. Code § 54952.2(c)(2).

d. Attendance at local community meetings

Attendance of a majority of members of a policy body at a meeting organized to address a topic of local community concern, such as a neighborhood project, an officer-involved shooting, or a controversial legislative proposal, is not a meeting of the body, provided that the meeting is open to the public and a majority of the members do not use the occasion to collectively discuss the topic of the gathering or other business. Cal. Govt. Code §54952.2(c)(3); Admin. Code § 67.3(b)(4)(B). The meeting must be organized by a person or organization that is not part of City government. Cal. Govt. Code §54952.2(c)(3). Thus, if a City department sponsors a local community meeting it may be unlawful for a majority of the commission that oversees that department to attend without having properly noticed it as a commission meeting. Consulting the City Attorney's Office in advance of such a meeting is advisable in these situations.

e. Attendance at meetings of a standing committee of the policy body

Attendance of a majority of members of a policy body at an open and noticed meeting of a standing committee of the body is not a meeting of the body, so long as members of the body who are not committee members attend as observers. Cal. Govt. Code § 54952.2(c)(6); Admin. Code § 67.3(b)(4)(C-1). But under these circumstances the role of an observer may be unclear and the committee meeting may present logistical and other complications. Consulting the City Attorney's Office in advance of such a meeting, and before noticing the meeting, is advisable in these situations.

f. Attendance at meetings of another policy body

The Brown Act states that attendance of a majority of a policy body at an open and noticed meeting of a second policy body is not a meeting of the first body, provided that a majority of the first body do not discuss among themselves, other than as part of the scheduled meeting, business within the jurisdiction of the first body. Cal. Govt. Code § 54952.2(c)(4). The Sunshine Ordinance does not have a parallel provision, but states that every member of a policy body retains the full constitutional rights of a citizen to comment publicly on the wisdom or propriety of government actions. Admin. Code § 67.17. The City Attorney's Office should be consulted regarding any scenario in which a majority of the members of a policy body might attend a meeting of another policy body.

10. Unlawful meetings

A meeting of a policy body may be unlawful for a variety of reasons; for example, because it has not been timely or properly noticed (see Section); is held outside the City without satisfying one of the narrow exceptions permitting such a meeting (see Section); or is held as a closed session without legal justification (see Section). We highlight below other types of unlawful meetings.

a. Seriatim meetings

Even if a majority of the members of a policy body are not present in one place at one time, an unlawful meeting can still occur. Cal. Govt. Code § 54952.2(b); Admin. Code §§ 67.3(b)(2), (3). The law considers communications among a majority of the members outside of a noticed public meeting a “seriatim” (or “serial”) meeting. Such communications, if substantive in nature, are generally unlawful.

The vice of seriatim meetings is that the public is unable to observe the policy body’s receipt of information and the discussions among the members of the body, and has no opportunity to offer public comment, at what is essentially a private meeting. That the members do not reach a consensus or make a decision makes no difference. The unlawful seriatim meeting occurs because of the receipt of information and discussion among the members. And a seriatim meeting that goes further, with the members reaching a consensus or agreeing to take an action, is likewise unlawful.

Seriatim meetings can occur by use of technology, such as fax, e-mail, text message, or telephone, or through an intermediary. For example, an unlawful meeting may occur when one member, or at a member’s request the clerk of the policy body, phones a majority of the members to discuss a substantive matter. Whether effected through a series of phone calls or a single conference call, such a meeting is unlawful because it involves a majority of the members.

A letter, fax, e-mail, text message, or other written communication from a member of a policy body to a majority of the members regarding matters within the body’s jurisdiction is not in itself unlawful. But there is a substantial risk that the initial one-way lawful communication could result in a seriatim meeting if a majority of the body ends up responding and effectively deliberating on or discussing a substantive matter. Communicating by e-mail or text message is of particular concern because the sender cannot control the actions of others in forwarding and responding to messages, which can easily lead to a substantive discussion among a majority of the body.

To avoid policy body members inadvertently triggering a seriatim meeting, we recommend that a member of the policy body who wishes to provide written materials to a majority of the body submit the materials to the clerk of the body to give to the members. The clerk may then include the materials in the policy body’s agenda packet for the next meeting and in the public review file, if the body is required to maintain one. Admin. Code § 67.23(a). Other members who receive these materials should refrain from responding until the meeting.

The seriatim meeting prohibition generally does not preclude members of a policy body from discussing outside of a formal meeting procedural matters, such as scheduling a special meeting or determining whether a quorum will be present at an upcoming meeting. Members of the body and its clerk must take care to ensure that such communications do not veer from procedure to substance and thereby become an unlawful seriatim meeting.

b. 'Pre-meetings' and 'post-meetings'

If a majority of the members of a policy body get together before a scheduled meeting to review items on the agenda or otherwise to discuss the business of the body or matters within its jurisdiction, they are conducting a meeting. Similarly, if, after the body has adjourned its meeting, a majority of the members discuss what happened, for example, by rehashing an agenda item or discussing a matter that the body continued to a subsequent meeting, they are conducting a meeting. Such “pre-meetings” and “post-meetings” are unlawful because the body has not properly noticed them and has not formally afforded the public the opportunity to attend and comment.

We do not suggest that casual or fleeting comments among a majority of a policy body’s members immediately before or after a meeting are unlawful per se. Nevertheless, we caution against substantive conversations at those times among a majority of the body pertaining to the business of the body.

B. Time, place, and notice requirements for meetings

1. Types of meetings

There are three possible types of meetings of policy bodies: Regular, special, and emergency. This Guide does not discuss emergency meetings in detail because the prerequisites for emergency meetings are so stringent that such meetings hardly ever occur. Such meetings may proceed only in the face of an “emergency” (a work stoppage, crippling activity, or other activity that severely impairs public health or safety) or a “dire emergency” (a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity so immediate and significant that providing one-hour notice of the meeting may endanger public health or safety). The Brown Act details the abbreviated notice requirements and other procedures applicable to emergency meetings. Cal. Govt. Code § 54956.5.

There are only a few differences in the legal rules governing regular and special meetings. The Sunshine Ordinance has eliminated the most important difference under state law, a longer notice period for posting agendas of regular meetings. The remaining differences are that, unlike at a regular meeting, there is no right of general public comment at a special meeting. But the policy body may allow it. In addition, there is no mechanism at a special meeting for addressing issues not on the agenda. Finally, a special meeting may not consider the salaries, salary schedules, or fringe benefits of a local agency executive, such as a department head, though it may be called to discuss the departmental budget. Cal. Govt. Code § 54956(b).

2. Time and place of meetings

a. Regular meetings

All policy bodies, except advisory bodies, must establish by ordinance, resolution, motion, or in their bylaws, the time and place for holding regular meetings. Cal. Govt. Code § 54954(a); Admin. Code § 67.6(a). Customarily, a policy body’s regular meetings are held at the same

time and place, for example, the first and third Monday of the month at 6:30 p.m. in City Hall. But a body may schedule regular meetings at dates or times that are not uniform if there is some degree of advance notice to the schedule. For example, the body may adopt a resolution in November setting the schedule for regular meetings for the coming year, with the meetings to be held on different weekdays in different months.

If a regular meeting would otherwise fall on a holiday, the policy body may hold the meeting on the next business day, unless it otherwise reschedules or cancels the meeting in advance. Admin. Code § 67.6(c).

b. Special meetings

The presiding officer or a majority of the members of a policy body may call a special meeting to occur at a time or place other than the time or place for regular meetings. Cal. Govt. Code § 54956; Admin. Code § 67.6(f). Typically a special meeting addresses one subject, rather than a range of subjects as is typical for regular meetings. But it is permissible to hold a special meeting on more than one subject.

If a policy body reschedules a regular meeting to a time other than the regular meeting time, it conducts the meeting as a regular rather than a special meeting. For example, there would be a period for general public comment, which is not required for special meetings. See Section V(C)(4)(c) below.

c. Meetings held within city limits

With limited exceptions, policy bodies must hold all their meetings in the City. Cal. Govt. Code § 54954(b); Admin. Code § 67.6(b). One exception is where the body inspects real property located outside the City. This Guide does not detail the other exceptions because only very rarely do they come into play. A policy body that wishes to hold a meeting outside of the City should consult the City Attorney's Office.

3. Notice of meetings: posting agendas

a. Regular meetings

All policy bodies must post regular meeting agendas in a location that is freely accessible to the public at least 72 hours before the meeting. Cal. Govt. Code § 54954.2(a); Admin. Code § 67.7(a), (c). Weekends are counted in calculating the 72 hours. It is advisable, though not legally required, to give more than 72 hours' notice of a meeting when weekend or holiday hours comprise part of the notice period. Further, as an administrative rather than legal matter, policy bodies may choose to regularly give more than 72 hours' notice of meetings, allowing for "extra time" to ensure that they meet that deadline.

The law requires two specific postings for regular meetings and we strongly recommend, where feasible, two additional postings:

- The public library. Policy bodies must send two copies of the agenda to the Government Information Center at the San Francisco Public Library, which must receive the copies at least 72 hours before the meeting. Admin. Code § 8.16.
- The departmental website. Policy bodies must post the agenda on their website at least 72 hours before the meeting. Cal. Govt. Code § 54954.2(a)(1), (d); Admin. Code § 67.7(a).
- The meeting room. To maximize notice to the public, we recommend posting the agenda on a bulletin board adjacent to the entrance to the meeting room where feasible.
- The departmental office. To maximize notice to the public, we recommend, where feasible, posting the agenda on a bulletin board or similar location in the departmental office that is easily accessible to the public.

b. Special meetings

The Sunshine Ordinance requires policy bodies to give notice of special meetings at least 72 hours in advance to each member of the body and any members of the media who have requested notice in writing. Notice should be delivered as reasonably requested and may be by personal delivery, U.S. mail, e-mail, or fax. Admin. Code § 67.6(f). We have interpreted the Sunshine Ordinance to impose the same public notice requirements for special meetings as for regular meetings. The policy body must post the notice at the San Francisco Public Library Government Information Center and on the body's website at least 72 hours in advance of the meeting. See generally Cal. Govt. Code § 54956(a), (c); Admin. Code §§ 8.16, 67.6(f), 67.29-2. In addition, we strongly recommend where feasible posting the notice at the meeting location and the departmental office.

If a policy body holds a special meeting in a building other than its regular meeting place, it must give public notice of the meeting at least 15 days in advance. Admin. Code § 67.6(f). The 15-day notice requirement does not apply if the special meeting is held in the same building as the body's regular meeting place, but a different room. The 15-day notice need not include a formal agenda but should specify the time and place of the meeting and generally identify the nature and purpose of the meeting. The body must post a formal agenda 72 hours in advance of the meeting, as with all special meetings.

c. Meetings of policy bodies that do not have a regular meeting schedule

The 72-hour notice and locational posting requirements apply to the inaugural meeting of a new policy body. But we recommend giving more notice of inaugural meetings if possible. In some cases the governing law creating the policy body may specify a longer notice period for the inaugural meeting of the body.

The 72-hour notice and locational posting requirements also apply to the meetings of advisory bodies that do not have regular meeting times.

4. Mailing agendas to interested persons

Policy bodies must send copies of agendas and agenda packets for regular and special meetings to any member of the public who has on file a valid written request for such materials. Cal. Govt. Code § 54954.1. These materials must be mailed at the time the agenda is posted or upon distribution to a majority of the policy body, whichever occurs first. A request is valid for the calendar year in which it is filed and to continue in effect must be renewed following January 1 of each year. We suggest that policy bodies notify members of the public who have made a standing request for such materials of the need to renew the request annually. The body's secretary or staff should update the mailing list annually to remove persons who no longer wish to receive the materials or are no longer at the listed address. Admin. Code § 8.17.

Policy bodies may charge a fee of one cent per page, plus any postage costs, for providing agendas and agenda packets in response to such standing requests, unless the body has set a special fee. Admin. Code §§ 67.9(e), 67.28(b), 67.28(d).

5. Alternative format of agenda for disabled persons

If requested, policy bodies must make available the agenda and documents constituting the agenda packet, without surcharge, in appropriate alternative formats to persons with disabilities. Cal. Govt. Code § 54954.1; Admin. Code § 67.7(f).

6. Cancellation of meetings

The City must provide notice of the cancellation of a meeting to the public as soon as reasonably possible. Admin. Code § 67.6(g). To the extent time permits, the policy body should post the cancellation notice on its website and at the San Francisco Main Library Government Information Center. Admin. Code § 67.6(g). It is desirable also to post the cancellation notice at the meeting site and at the departmental office. If time permits, the policy body should mail notice of the cancellation to those members of the public who have requested in writing to receive meeting agendas. Admin. Code § 67.6(g). Though not legally required, we recommend that bodies give notice of the cancellation to parties with a matter on the agenda and to persons who normally receive agendas by e-mail.

C. Meeting agendas

1. Description of agenda items

a. The "meaningful description" standard

Meeting agendas must contain a meaningful description of each item of business that the policy body will discuss or on which it may take action. The description must be sufficiently clear and specific to alert people of average intelligence and education whose interests are affected that they may have reason to attend the meeting or seek more information on the item. The description should be brief, concise, and written in plain English. Cal. Govt.

Code § 54954.2(a); Admin. Code §§ 67.7(a), (b). Even consent agenda items must meet the "meaningful description" standard. Where an agenda includes an item to be heard in closed session, special description requirements may apply. See Section IV(H)(1)(a) below.

For special meetings, the agenda must "specify ... the business to be transacted or discussed." Cal. Govt. Code § 54956(a); Admin. Code § 67.6(f). Though phrased slightly differently than the agenda description requirement for regular meetings, there is no substantive difference between the two requirements. Description of agenda items is important because, with very limited exceptions, policy bodies may not consider matters that are outside the scope of an agenda item. In particular instances, it may be unclear whether the description of an agenda item satisfies the "meaningful description" standard. And on occasion there can be tension between a description that is meaningful and one that is brief and concise. In such cases, it often is better to err on the side of a longer, more informative description. Where description of an agenda item presents close or difficult issues, we advise that staff responsible for preparing the agenda consult the City Attorney's Office before posting the agenda.

No precise formula dictates whether a description of an agenda item is legally adequate. That determination must be made case-by-case. Sometimes an agenda item may inadvertently be framed so narrowly or with so much specificity that it may unintentionally confine the policy body's range of discussion or action. Advance consultation with the City Attorney's Office can minimize such problems. Sometimes it is best for an agenda description of an item to highlight specific components of an issue that are expected to be the main focus of discussion and action at the meeting, but also to include more open-ended language that would clearly permit discussion or action concerning other components of the issue.

A policy body may amend and then adopt proposed legislation, rules, and other policy proposals at the same meeting, so long as the amendments of the original proposals are within the reasonably foreseeable scope of changes that debate could produce in light of the description of the item on the agenda. But if the basic nature of the proposal would change, going beyond the scope of the notice on the agenda, the body must calendar the proposed change for consideration at a later meeting.

In some cases it will matter whether a change in proposed legislation, rules, or policies is a contraction or expansion of the original proposal described on the agenda. For example, if the description references a tract of land, a proposal affecting only a portion of the tract would likely be within the description, but a proposal broadening the land affected likely would not be. Similarly, if the description references the City's prospective purchase of property for a specified amount. A proposal that the City pay less would likely be within the description, but a proposal that the City pay more likely would not be. On the other hand, if the description references the City's prospective sale of property for a specified amount, a proposal that the amount of the sale be larger would likely be within the description, but a proposal that the sale price be smaller likely would not be.

We emphasize that such issues must be assessed case-by-case and generalizations in this area are not determinative. If a policy body has questions about whether another meeting is

necessary to take action, it should consult the City Attorney's Office if possible in advance of making that decision.

b. Discrete actions

In some circumstances the law requires a policy body to take discrete actions before rendering a decision. For example, in some circumstances the California Environmental Quality Act ("CEQA") requires the policy body to make environmental findings before a proposal can be adopted. Where one action by the policy body is a formal prerequisite to another action by the policy body, it is advisable and in some cases such as CEQA determinations may be legally required to include both actions in the agenda description.

c. Erroneous agenda items

Occasionally, the description of an agenda item contains an error. If the error is material, the general rule is that the policy body must continue the item without taking any action. Whether an error is material depends on the facts and circumstances. It may be material if it substantially misstates the substance of the agenda item so that potentially interested members of the public might have attended the meeting or sought further information about the item had it not contained the error.

d. Amended agenda items

Sometimes after having posted the agenda, the policy body wishes to amend it; for example, by adding or changing the description of an agenda item. There is no legal barrier to doing so if the amended agenda is posted in advance of the 72-hour deadline for posting agendas. But once that deadline has passed, the agenda may be amended only under limited circumstances. A new item may not be added to the agenda unless at the meeting the policy body confirms that the new item meets one of the limited exceptions to the agenda requirement, discussed at Section IV(D)(3) below.

Nevertheless, during the 72-hour notice period, an agenda item may be modified to more clearly state its scope; for example, providing greater detail or explanation than the original description. Improving a legally adequate agenda description during this period is permissible, so long as the modification is reasonably within the scope of the original description.

When amending an agenda, it is advisable, though not legally required, that the agenda be labeled "Amended Agenda" and that the portion that has been amended be clearly identified to the public.

e. "Discussion" and "action" items

Each agenda item must state whether the policy body will take action on the item and describe the proposed action, or will merely conduct a discussion. Admin. Code § 67.7(a). Where an agenda describes an item as a discussion item, the policy body may not take action on it. Sometimes the drafter of the agenda may not know whether the policy body will only discuss the item or will also wish to take action on it. In such instances, the agenda may describe the item as "discussion and possible action."

2. Materials accompanying agenda items

The agenda must refer to explanatory documents, such as correspondence or reports that the policy body has received in connection with an agenda item. The clerk of the body must post these documents adjacent to the agenda if they are one page in length. If they are longer, they need not be posted with the agenda, but the agenda must indicate where the documents are available for public inspection and copying. Admin. Code § 67.7(b).

The law does not require that agenda items have accompanying materials. Nor does it limit policy bodies to considering at meetings only documents that existed when the agenda was posted. Often policy bodies consider documents that members of the public, staff, and others present to the body after the posting of the agenda, including at the meeting. The Brown Act and Sunshine Ordinance require that the body give members of the public access to these materials at roughly the same time members of the policy body get them. See Section IV(F)(4) below.

3. Discussing or acting on items not on the agenda

Generally, policy bodies may discuss or take action on only items listed on the agenda. Policy bodies may act on an item not listed on the agenda only in three limited situations, described below. Cal. Govt. Code § 54954.2(b); Admin. Code § 67.7(e).

- Upon a determination that an accident, natural disaster, or work force disruption poses a threat to public health and safety. The policy body makes this determination by majority vote of the body.
- Upon a good faith and reasonable determination that the need to take immediate action on the item is so imperative as to threaten serious injury to the public interest if action is deferred to a subsequent special or regular meeting, or the action relates to a purely commendatory action, and the need for such action came to the attention of the policy body subsequent to the posting of the agenda. The body makes this determination by a two-thirds vote of the body, or if fewer than two-thirds of the members are present, by unanimous vote of those present.
- The item appeared on a regular meeting agenda for a meeting occurring no more than five calendar days earlier at which the policy body continued the item to the meeting at which the body is acting on it.

These three limited powers to act on matters not listed on the agenda apply only to regular meetings of policy bodies. For special meetings, the body may consider only matters stated on the agenda; there are no exceptions. Cal. Govt. Code § 54956(a); Admin. Code § 67.6(f).

During general public comment, discussed at Section IV(F)(3) below, members of the public raise topics not on the agenda. Members of the policy body may not engage in a discussion of such matters because the topics have not been agendized. But they may ask questions or make simple announcements for clarification, ask staff for information or to report back to the body on the matter at a subsequent meeting, or ask that the matter be calendared for a subsequent meeting. Cal. Govt. Code § 54954.2(a)(2); Admin. Code § 67.7(d). These limited

steps do not constitute “discussion” or “action” under the open meeting laws and thus may take place during a meeting even though not on the agenda.

The same principles apply to matters absent from the agenda and not mentioned during the general public comment period, for example, the department head’s brief report on developments breaking after the posting of the agenda. Members of the policy body may take the same limited steps regarding such matters during the meeting. Members also may make a brief announcement or briefly report on their activities. Cal. Govt. Code § 54954.2(a)(2).

4. Mandatory notices and information on agendas

Every agenda must contain certain information. Sometimes the law requires precise language. Below we discuss categories of information to include on agendas. As explained below, some of these requirements apply to agendas for all meetings of all policy bodies; others have more limited applicability.

- Date/time of meeting
- Place of meeting
- Opportunity for general public comment
- Opportunity for public comment on agenda items
- Sunshine rights
- Ringing and use of cell phones
- Sensitivity to chemical-based products
- Disability accommodation
- Location of materials accompanying agenda items
- Location of agenda materials distributed less than 72 hours before meeting
- Lobbying activity
- Other information pertaining to the meeting or policy body

a. Date/time of meeting

Agendas must state the date and time of the meeting. Cal. Govt. Code §§ 54954.2(a)(1), 54956(a); Admin. Code §§ 67.6(f), 67.7(c).

b. Place of meeting

Agendas must state the location of the meeting. Cal. Govt. Code §§ 54954.2(a)(1), 54956(a); Admin. Code §§ 67.6(f), 67.7(c).

c. Opportunity for general public comment

Agendas for regular meetings, but not special meetings, must provide an opportunity for general public comment. Cal. Govt. Code § 54954.3(a); Admin. Code § 67.15(a). See Section IV(F)(3) below.

d. Opportunity for public comment on agenda items

Agendas must provide an opportunity for public comment on specific agenda items. Cal. Govt. Code § 54954.3(a); Admin. Code § 67.15(a). See Section IV(F)(3) below. It is permissible to list “public comment” under each agenda item, but such listings are unnecessary if the agenda contains a notice to the effect that there will be an opportunity for public comment on each agenda item, or otherwise expressly provides that opportunity.

e. Sunshine rights

Agendas must inform members of the public of their rights under the Sunshine Ordinance, and that they may contact the Sunshine Ordinance Task Force to learn more about their rights or complain of a violation. Admin. Code §§ 67.7(g), (h). The following notice should appear on agendas:

KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE

(Chapter 67 of the San Francisco Administrative Code)

Government’s duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City and County exist to conduct the people’s business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people’s review.

FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE SUNSHINE ORDINANCE TASK FORCE.

[Name of Contact Person]

Sunshine Ordinance Task Force

City Hall, Room 244

1 Dr. Carlton B. Goodlett Place

San Francisco, CA 94102-4689

Phone: (415) 554-7724, Fax: (415) 554-5784

E-mail: sotf@sfgov.org

Copies of the Sunshine Ordinance can be obtained from the Clerk of the Sunshine Ordinance Task Force, at the San Francisco Public Library, and on the City’s website at <http://www.sfgov.org>.]

f. Ringing and use of cell phones

Agendas must state that the ringing and use of cell phones, pagers, and other sound-producing electronic devices are prohibited during the meeting. Admin. Code § 67A.1. The following language should appear on agendas and be stated at the beginning of each meeting:

The ringing and use of cell phones, pagers, and similar sound-producing electronic devices are prohibited at this meeting. The Chair may order the removal from the meeting room of any person responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic device.

g. Sensitivity to chemical-based products

Agendas for boards and commissions enumerated in the Charter must include a notice concerning sensitivity to chemical-based products such as perfume. Admin. Code § 67.13(d). The following language should appear on agendas for meetings of such policy bodies:

In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity, or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical-based products. Please help the City accommodate these individuals.

h. Disability accommodation

Agendas must include information regarding how, to whom, and when a person with a disability may request a modification or accommodation, including auxiliary aids or services, to participate in the meeting. Cal. Govt. Code § 54954.2(a); Admin. Code § 67.13(b). The following language should appear on agendas:

To obtain a disability-related modification or accommodation, including auxiliary aids or services, to participate in the meeting, please contact [name of person and contact information] at least 48 hours before the meeting, except for Monday meetings, for which the deadline is 4:00 p.m. the previous Friday.

i. Location of materials accompanying agenda items

As previously noted, agendas must state the location where materials accompanying agenda items are available for inspection and copying during regular office hours. Admin. Code § 67.7(b).

j. Location of agenda materials distributed less than 72 hours before meeting

Agendas must also include information regarding the location where members of the public may inspect agenda materials distributed to the policy body fewer than 72 hours before a meeting. Cal. Govt. Code § 54957.5(b)(2). Agendas should contain the following language:

Any materials distributed to the members of [name of policy body] within 72 hours of the meeting or after the agenda packet has been delivered to the members are available for inspection at [name and address of office of policy body] during regular office hours.

k. Lobbying activity

The Ethics Commission has requested that each policy body place the following language on all agendas. Though not legally required, all agendas should state:

Individuals who influence or attempt to influence local policy or administrative action may be required by the San Francisco Lobbyist Ordinance (San Francisco Campaign and Governmental Conduct Code sections 2.100 – 2.160) to register and report

lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102, telephone (415) 252-3100, fax (415) 252-3112 and website: <http://www.sfgov.org/ethics/>.

I. Other information pertaining to the meeting or policy body

Agendas may include information related to the meeting that the law does not require but that is useful to the public. For example, agendas may include the policy body's rules for conducting meetings, such as its process for receiving public comment. As another example, agendas may identify the mass transit routes that would be convenient to take to and from meetings.

Agendas may also include notices and announcements pertaining to the work of the policy body and matters over which it has jurisdiction. For example, a policy body may include on agendas notices of upcoming meetings of Board of Supervisors committees or other bodies that will address matters within the policy body's jurisdiction. As another example, agendas may include a prominent notice of an upcoming hearing to adopt a regulation, in accordance with the Charter's 10-day notice requirement for such a hearing. Charter § 4.104(a)(1).

D. Conduct of meetings

Policy bodies have wide discretion to adopt rules or follow practices regarding the conduct of meetings, provided the rule or practice does not violate the Brown Act, Sunshine Ordinance, or other law. Not every detail concerning the conduct of meetings presents a legal issue. Parliamentary questions typically do not present legal issues.

Some policy bodies adopt rules for the conduct of meetings, typically through bylaws or resolutions. Generally, policy bodies are not required to have bylaws, but many do, especially boards and commissions enumerated in the Charter. Some purely advisory bodies have bylaws and others do not. In some cases the governing law creating the policy body may require that it adopt bylaws.

This Guide does not address internal rules of policy bodies for the conduct of meetings. Rather, the discussion below addresses legal issues regarding the conduct of meetings.

1. Timing and sequencing issues

Policy bodies may not start meetings before the time stated on the agenda. But they may start meetings late if necessary; for example, to obtain a quorum or extend a courtesy to a member caught in traffic, or because another meeting in the same meeting room has not ended.

Policy bodies are not required to consider agenda items in the order they appear on the agenda. But the presiding officer must announce sequencing changes at the start of the

meeting, or as soon as they are known. Admin. Code § 67.15(e). If the agenda specially indicates that an item will be heard at a certain time, it may not be heard before then.

Policy bodies may begin consideration of an agenda item and then continue consideration of the item to a later point in the meeting. If that occurs, the presiding officer should make clear that the body has not yet completed its consideration of the item, and take care to assure that continuing the item does not compromise the public's right to comment on it.

Policy bodies occasionally consider rescinding an action taken earlier in the meeting. As a technical procedural matter, a policy body may reopen a completed agenda item before the meeting has concluded. But if it is not necessary to immediately rescind the prior action, it may be preferable in some circumstances to continue the item to a later meeting at which the body would consider rescinding the action and acting anew on the agenda item. This approach may minimize confusion that may arise from the body's rescinding an action taken earlier in the meeting, and reduce the risk that the right of public comment may be inadvertently compromised in the process.

2. Quorum requirements

A majority of the members of a policy body constitutes a quorum for the transaction of business. Charter § 4.104(b); see generally Cal. Govt. Code § 54952.2(a); Admin. Code § 67.3(b) (defining "meeting" by reference to majority of members). For quorum purposes, "transaction of business" is an all-encompassing term that includes not only taking action on agenda items but also discussing them, receiving public comment, receiving staff reports, and conducting hearings, among other things. For quorum purposes, "majority" is measured by the number of members of the policy body designated by law, not the number of seats actually filled.

Many boards and commissions have seats that are in some manner restricted. For example, seats may be divided among two or more appointing authorities; may be designated for members drawn from a neighborhood, a particular community, an industry, or a profession; may be restricted to persons with specific credentials or experience; or may be reserved for particular types of individuals, such as disabled persons. As a general rule, unless the law creating the body with the restricted seat expresses a contrary intent, such a body may conduct business where a restricted seat is vacant so long as the body has and retains a numerical quorum.

When a quorum fails to attend a meeting or the policy body loses a quorum at a meeting because of the departure of a member, the only official actions that the body may take are to (1) fix the time to which to adjourn, (2) adjourn the meeting, (3) recess the meeting, or (4) take measures to secure a quorum. See generally Cal. Govt. Code §§ 54955, 54955.1. Other actions that a body may take while it does not have a quorum are void.

If a meeting ends because of the loss of a quorum, or never began because of the absence of a quorum, members of the policy body who are there may remain to discuss any matter with members of the public. There is no unlawful "meeting" because a majority of the members of the body are not present. The members who remain to confer with the public should make

clear that their discussions do not constitute a meeting and that the body may take no action. If documents are collected, notes taken, or a recording made, those may be presented at the next meeting of the policy body or one of its committees to become part of the policy body's record.

If there is a lack of a quorum at a meeting of a policy body that has committees, the parent body may not reconstitute itself as a committee of the whole or as one of its committees, even if a quorum of that committee is present. Such a committee meeting would require a separate notice and posting of an agenda for a meeting of that committee.

3. Voting requirements

Secret or anonymous ballots are prohibited. Cal. Govt. Code § 54953(c); see generally Charter §§ 2.108, 4.104(a)(3); Admin. Code §§ 1.29, 67.16. Even if members of the policy body think that a public vote on an item would be awkward or unpleasant, as sometimes happens when the body is electing officers, the body must conduct a public vote. Only votes during closed sessions may occur in secret – and, even then, the body must disclose many of those votes at the end of the closed session. See Section IV(H)(1)(f) below.

An absent member of a policy body may not vote by proxy. See generally Charter §§ 2.104(b), 4.104(b); Admin. Code §§ 1.29, 67.16. The Brown Act and Sunshine Ordinance presuppose that members of policy bodies will render decisions at meetings. To permit an absent member to cast a vote without being at the meeting, by communicating the vote to another member or the clerk of the body, is inconsistent with these laws. Further, proxy voting is at odds with the City's requirement that members of appointive boards, commissions, and other units of government, and members of bodies created by legislation, be "present" at meetings. See Section IV(E)(4) below.

Once an action has been taken, the policy body must disclose the action and announce the vote of each member of the body. Cal. Govt. Code § 54953(c)(2). Similar but more specialized rules govern disclosure of actions taken and votes of policy body members in closed session.

Members of appointive boards, commissions, and other units of government, and members of bodies created by legislation, must vote on every matter before them, with two exceptions. As noted elsewhere in this Guide, a member must not vote on a matter where the member's vote would violate a conflict of interest law. In addition, the body by a motion adopted by a majority of members present may excuse a member from voting for any reason. Charter §§ 2.104(b), 4.104(b); Admin. Code § 1.29.

For appointive boards, commissions, and other units of government, when determining whether action on an agenda item is approved, the policy body must count the vote based on the total number of seats comprising the body rather than the number of seats currently filled or number of members present. Charter § 4.104(b). The policy body's rules may provide for votes on procedural matters to be determined by a majority of the members present, so long as a quorum is present. Charter § 4.104(b). The Charter does not define a "procedural" matter for this purpose, and context may be critical to the definition. If there is

a question whether a particular vote is on a procedural matter, it is advisable to consult with the City Attorney's Office, preferably in advance of the meeting if the presiding officer or others anticipate that the question may arise.

4. Meetings by teleconference

"Teleconference" means a meeting of a policy body, the members of which are in more than one location, connected by electronic means, through either audio or video, or both. Cal. Govt. Code § 54953(b)(4). Under the Brown Act, policy bodies may elect to meet by teleconference, if certain requirements are satisfied. Cal. Govt. Code §§ 54953(b)(1), (2). But the Charter requires the physical presence at one meeting site of the members of appointive boards, commissions, or other units of government, and the Administrative Code contains a similar "presence" requirement for policy bodies created by legislation. Charter § 4.104(b); Admin. Code § 1.29. Therefore, these bodies may not meet by teleconference.

Policy bodies not covered by the proscription against teleconferencing may elect to meet by teleconference if the Brown Act's requirements are satisfied: Each teleconference location must be identified on the agenda; the agenda must be posted at each location; each location must be accessible to the general public and to disabled persons; members of the public must have an opportunity to address the rest of the body directly from each teleconference location; and during the teleconference at least a quorum of the body must participate from within the geographic boundaries of the City. Cal. Govt. Code §§ 54953(b)(3), 54961. As a practical matter, these requirements may be difficult to satisfy.

There is one exception to the Charter's proscription of teleconferencing. If authorized by ordinance, teleconferencing is permitted when a member of a policy body is physically unable to attend a meeting in person, as certified by a health care provider, due to the member's pregnancy, childbirth, or related condition, and also when a member is absent to care for his or her child after birth of the child, or after placement of the child with the member or the member's immediate family for adoption or foster care. Charter §§ 4.104(b), 4.104(c). But the Board of Supervisors has not enacted an implementing ordinance. See also Charter §§ 2.104(a), (c) (parallel provisions applicable to the Board of Supervisors).

Rules regarding teleconferencing apply only to members of policy bodies. Thus, for example, a policy body has discretion to schedule a presentation on an agenda item to be made from another part of the country via teleconference. But in some adjudicative contexts, receiving testimony from witnesses not present at the meeting may present due process or other procedural problems.

5. Text messaging during meetings

Neither the Brown Act nor Sunshine Ordinance addresses text messaging during meetings, and there is no definitive case law on the subject. The City Attorney's Office strongly discourages the practice.

Text messaging or use of other personal electronic communications devices during meetings is especially problematic when the policy body is holding an adjudicative hearing, such as a hearing to grant or suspend a permit, that will affect individual private interests. Text messaging during such a hearing could enable a member to surreptitiously communicate with one of the parties, or receive evidence or direction as to how to vote, from an outside party, that other members of the body and the parties do not see. These circumstances may undermine the integrity of the proceeding and raise due process concerns.

Even outside the adjudicative context, text messaging or use of other personal electronic communications devices during any meeting of a policy body presents serious problems. The Brown Act and Sunshine Ordinance presume that public input during a meeting will be “on the record” and visible to those who attend or view a tape of the meeting. But members of the public will not observe the text messages that members of the policy body receive during the meeting. Hence the public will not be able to raise all reasonable questions regarding the basis for the policy body’s actions. And text messaging among members of the policy body concerning an agenda item or other business of the body could lead to an unlawful seriatim meeting in the midst of a formal meeting.

Text messages that policy body members send or receive during a meeting may in fact have nothing to do with the body’s business. But a member of the public observing the meeting, not knowing the contents of the text messages, may assume otherwise. To avoid the problems associated with text messaging or similar electronic communications during meetings, we recommend that policy bodies adopt a rule prohibiting or regulating the practice.

It is an open question whether text messages, or similar communications over a personal electronic device, that a member of a policy body sends or receives either during or outside a meeting, that relate to the conduct of the body’s business, are public records. There is a strong argument that they are, and out of an abundance of caution, members of policy bodies should assume that communications on personal electronic devices may be subject to disclosure if the communication would otherwise be a public record subject to disclosure.

6. Disruption of meetings

Generally, two sorts of disruptions can occur at meetings of a policy body. Individuals may disrupt the meeting by making noise, speaking out of turn, or otherwise refusing to comply with the body’s rules or the presiding officer’s lawful direction of the meeting. The presiding officer may order the removal of individuals engaging in disruptive behavior. Depending on the circumstances, before taking this step, the presiding officer should warn the offending individual and afford an opportunity to correct the behavior. In other cases, there may be a general disruption such that removal of the willful disrupters will not restore order. In these situations, the policy body may order the room cleared and then continue with the meeting. In such an event, representatives of news media not involved in the disruption have a right to remain in the meeting. A policy body may adopt a procedure to readmit individuals not responsible for the disruption. As an alternative to ordering the room cleared, the body may

choose to continue the meeting to another date, or may take a short recess. Cal. Govt. Code § 54957.9.

Passive, silent protest during a meeting of a policy body is likely constitutionally protected, no matter when it occurs and regardless of the body's formal rules. Such protest may be offensive to members of the body but not likely to actually disrupt the meeting.

7. Adjourning or continuing meetings

The terms "adjourn" and "continue," as used in the Brown Act, refer to a policy body's action to postpone or finish at a later time a noticed meeting or consideration of a specific item or items on the agenda. In this discussion, we use the term "continue" for both types of actions. A policy body may need to continue a meeting when the hour gets late, the body lacks or loses a quorum, the body seeks additional information about an agenda item, or for other reasons.

If no member of the policy body is present for a regular meeting, the secretary or clerk may continue the meeting to a future time and place. Upon doing so, the secretary or clerk must give the members written notice in the same manner required for special meetings, which the members may waive. Cal. Govt. Code §§ 54955, 54955.1, 54956(a)(1). But the clerk or secretary may not continue a special meeting; a special meeting would have to be renoticed.

For regular and special meetings, when less than a quorum of a policy body is in attendance, the member or members present may continue the meeting to a future time and place. Cal. Govt. Code §§ 54955, 54955.1. As previously discussed, there are only a limited number of actions that less than a quorum of a policy body may take. See Section IV(E)(2) above.

The secretary or clerk must post a notice of the time and place for the continued meeting in a conspicuous manner on or near the door of the place of the original meeting. If the continued meeting is scheduled to be held within 24 hours, the notice must be posted immediately. If the continued meeting is scheduled to be held more than 24 hours later, the notice must be posted no later than 24 hours after the continuance. Cal. Govt. Code §§ 54955, 54955.1.

The Sunshine Ordinance enhances these notice requirements by providing that if a meeting must be continued for any reason, notice of the change shall be given to the public as soon as is reasonably possible. Admin. Code § 67.6(g). Further, if time permits, the notice should be posted on the policy body's website and at the Government Information Center of the Main Public Library, and mailed to members of the public who have requested, in writing, to receive meeting agendas. Admin. Code § 67.6(g).

If the continued meeting is held within five days and proper notice of the continuance was given, items on the agenda for the original meeting may be considered at the subsequent meeting without issuing a new agenda. If the continued meeting is held more than five days later, the policy body must comply with all of the notice and agenda requirements for either a special or regular meeting, as appropriate.

E. Rights of the public at meetings

1. The right to attend meetings

Members of the public have a right to attend meetings of policy bodies. Cal. Govt. Code § 54953(a); Admin. Code § 67.5. Accordingly, policy bodies may not impose discriminatory admission requirements for meetings, or hold meetings in a facility that prohibits admission on the basis of race, color, religion, national origin, ethnic group identification, ancestry, sex, sexual orientation, age, disability, or other actual or presumed class identity or characteristics. Cal. Govt. Code §§ 11135, 54961(a); Admin. Code § 67.13(a). Nor may they hold meetings in a facility or room that is inaccessible to disabled persons or where members of the public must make a payment or purchase as a condition of being there. Cal. Govt. Code § 54961(a); Admin. Code § 67.13(a).

Further, a policy body may not require a member of the public to register the person's name, complete a questionnaire, provide other information, or fulfill any other precondition to attend a meeting. If an attendance list, register, questionnaire, or similar document is posted at or near the entrance to the meeting room or circulated to those attending the meeting, it must clearly state that signing or completing the document is voluntary and that any person may attend the meeting without signing or completing the document. Cal. Govt. Code § 54953.3. It is advisable, though not required, that the document also state that persons may address the body during the meeting without signing or completing it. These provisions help ensure that people will feel free to attend meetings of policy bodies in relative anonymity and without being subject to inquiries or conditions that could discourage them from attending.

Where meetings of policy bodies are held in buildings that require entrants to sign in, the sign-in requirement is lawful. Even so, in some circumstances, such as an evening meeting of a policy body in a building that is otherwise vacated, members of the public may have concerns regarding the right to attend the meeting anonymously and without preconditions. In such a case, the policy body may wish to consult the City Attorney's Office in advance to address such concerns.

Occasionally the room where a policy body is holding a meeting does not have the seating capacity to accommodate the large number of people who wish to attend. Where the Board of Supervisors, a board or commission enumerated in the Charter, or a committee thereof, anticipates that the crowd in attendance will exceed the legal capacity of the meeting room, the policy body must, as a general rule, use an "overflow" room equipped with an adequate broadcasting system that allows persons to hear the meeting. Admin. Code § 67.13(a). Persons in the overflow room must be allowed in the meeting room to exercise their right of public comment.

The right to attend meetings of policy bodies, though critical to open government, is not absolute. It does not extend to the closed session portion of a meeting. See Section IV(H) below. Nor, as discussed previously, does the right preclude policy bodies from excluding some or all members of the public from the meeting, where disruption of the meeting

warrants their exclusion. There may be other rare circumstances where the law permits or requires the exclusion of a member of the public from a meeting of a policy body. In these unusual situations, we advise that the policy body consult in advance with the City Attorney's Office.

2. The right to record, film, photograph, and broadcast meetings

Members of the public have a right, using their own resources, to tape record, film, photograph, or broadcast meetings of policy bodies. A policy body may not curtail this right to avoid publicizing a meeting or to discourage public participation. It may curtail this right only to the extent it reasonably finds that because of noise, illumination, or obstruction of view, the activity would persistently disrupt the meeting. Cal. Govt. Code §§ 54953.5(a), 54953.6; Admin. Code § 67.14(a). This "persistent disruption" standard is difficult to meet and could probably be met, if at all, only rarely and in unusual circumstances.

3. The right of public comment at meetings

Members of the public have an important but limited right to participate in meetings of policy bodies. They have the right to speak ("comment") at meetings.

a. Types of public comment

There are two types of public comment – comment on agenda items, and comment on matters not on the agenda but within the subject matter jurisdiction of the policy body. This latter category is often called "general public comment." At regular meetings, policy bodies must afford an opportunity for both types of public comment. By contrast, at special meetings, policy bodies must provide an opportunity for comment on agenda items, but need not provide an opportunity for general public comment. Cal. Govt. Code §§ 54954.3(a), 54956(a); Admin. Code §§ 67.15(a), (b).

Some laws, such as CEQA (the California Environmental Quality Act), require an opportunity for public participation at certain hearings. Such public participation rights are independent of the right of public comment under the Brown Act and Sunshine Ordinance.

b. Timing of public comment

For comment on agenda items, the public has a right to speak before the policy body takes action on the item. With agenda items that are for discussion only, the public must be allowed to speak before or during the body's consideration of the item. Cal. Govt. Code § 54954.3(a); Admin. Code § 67.15(a).

Within these parameters there is flexibility in the timing of public comment on agenda items. For example, the presiding officer may ask for public comment immediately after the item is called, or may ask for public comment only after the members of the body have discussed the item, so long as it is still under consideration. A body may also ask for public comment

on all agenda items at the beginning of the meeting, but only if the procedure allows adequate time for public comment on those items.

There are no restrictions on the timing of the general public comment period. Often policy bodies have this period at the beginning or the end of the meeting. But policy bodies may provide the opportunity for general public comment at any point in the meeting. The body may even divide the general public comment period; for example, allowing thirty minutes of general public comment at an early stage in the meeting, and if that period does not accommodate all speakers, allowing more time for general public comment at a later stage of the meeting.

c. Time limits for speakers

Policy bodies must allow each member of the public to speak once on each agenda item for up to three minutes. Admin. Code § 67.15(c). The policy body may reasonably limit public comment on an item to less than three minutes per speaker based on such factors as the nature of the item, the number of anticipated speakers for the item, and the anticipated duration of other agenda items. Where many people are offering public comment on the same agenda item, the presiding officer may encourage speakers to avoid repeating the comments of others.

Sometimes members of the policy body ask questions of a speaker who is giving public comment. The body must not count the time for the question and answer against the speaker's time. Similarly, following the period for public comment on an agenda item, if a member of the body questions a person who has offered public comment on the item, the speaker may respond, even if the speaker's time for public comment has been exhausted.

Policy bodies must apply time limits uniformly to members of the public. Admin. Code § 67.15(c). For example, individual speakers favoring one side of an issue may not be given more time than individual speakers on the opposite side. Similarly, public speakers who comment first on an agenda item may not be given more time than those who comment later. But the equal time requirement does not apply to speakers who are not considered members of the public for this purpose. Such speakers include, for example, public officials or employees appearing before the policy body in an official capacity; parties to a proceeding before the body; and persons whom the body has scheduled to make a presentation on an agenda item.

The right of public comment is personal to each member of the public who attends the meeting. Persons in attendance may not "donate" their speaking time to another speaker, thereby giving that speaker more time for public comment than others. When an organization has no official role regarding an agenda item, one organizational representative has a right to comment on the item only for the same amount of time as an individual member of the public.

If a member of the public has a disability that impairs the ability to speak, then the policy body must extend that person's public comment time as necessary to reasonably accommodate the person. The body also may grant additional time to accommodate

members of the public who require use of a translator. Special rules govern the use of translators for this purpose at meetings of the Board of Supervisors and its committees. Admin. Code § 67.13(e).

d. Public comment on consent agenda items

Sometimes policy bodies group routine action items that are not expected to generate discussion under a single agenda designation – the "consent agenda." The public must be given an opportunity to comment on any or all items on the consent agenda. Typically the consent agenda is treated as a single item for the purpose of public comment. But if an item is severed from the consent agenda, it should be treated as a separate item for purposes of public comment requirements.

The law does not discretely address the issue of consent agenda items, much less establish a clear standard for inclusion or exclusion of items on a consent agenda. As a rule of thumb, matters that are simple or routine may be consent agenda items. If matters that do not meet that standard are included, there is a risk of undermining, and possibly violating, the right of public comment regarding those matters.

e. Content of public comment

A meeting is a limited public forum and a policy body must give broad rein to a speaker's right of self-expression so long as the comments relate to the specific agenda item or under general public comment to items under the jurisdiction of the body. Members of the public have the right to criticize the policy body's programs, practices, policies, and services, as well as its members and staff. Cal. Govt. Code § 54954.3(c). Criticism may be harsh, unfair, insolent, discourteous, or otherwise obnoxious. Sometimes it is appropriate to request that a speaker phrase criticism more respectfully, but to require that public comment be respectful would, in almost all circumstances, be unlawful except in the limited circumstances described below.

The presiding officer may reasonably confine a speaker's comments to the agenda item under consideration or, for general public comment, to the subject matter jurisdiction of the body. For example, a public comment about an employee's personal life would likely not be germane to any matter under the body's jurisdiction unless it clearly related to work performance. Further, the presiding officer may inform a speaker that neither the Brown Act nor the Sunshine Ordinance protects members of the public from liability for defamatory statements made during public comment. Cal. Govt. Code § 54954.3(c).

In extreme and unusual circumstances, public comment may arguably constitute discriminatory or harassing speech that may pose a risk of liability for the City under state or federal civil rights laws. To address this issue, the Mayor's Office has issued a "Policy on Discriminatory or Harassing Remarks Made at Public Meetings of City Boards and Commissions," a copy of which is reprinted at the end of the Guide.

As a general rule, the policy body may not restrict the form of communication used by a speaker during public comment. Occasionally a speaker wishes to incorporate in the speaker's public comment a video or audio recording. Incorporating such media into public

comment is permissible so long as the speaker adheres to the general rules governing public comment, such as germaneness and time limits. The policy body has no obligation to provide video or audio equipment to facilitate this type of public comment, but if the speaker provides such equipment, the body must reasonably accommodate the speaker's chosen mode of expression.

f. Procedures relating to public comment

A policy body may adopt reasonable rules and regulations relating to public comment. Cal. Govt. Code § 54954.3(b); Admin. Code § 67.15(c). Even absent formal rules, staff or the presiding officer, with the tacit or express approval of the policy body, may implement procedures for public comment. For example, some policy bodies ask members of the public who wish to comment on an agenda item to submit a speaker card in advance. A speaker card system may aid the presiding officer in conducting the meeting in an orderly fashion and may aid staff in preparing meeting minutes. The details of a speaker card system, or other systems for administering public comment, are largely within the discretion of the policy body or its presiding officer. But, as discussed below, any public comment procedures must accommodate the right of individuals to address the body anonymously.

A policy body may anticipate that a particular item will elicit a great deal of public comment. It may consider scheduling the meeting in two sessions – one for staff presentation, public comment, and in some cases the taking of evidence; the other for the body's deliberation and possible action. Even absent advance planning for a meeting on an item to be held in two sessions, a policy body may conduct a hearing with public comment but find that it does not have time to complete its deliberation and take action, and may then close public comment after all members of the public wishing to do so have spoken, and recess the meeting to a later date for the body to deliberate and possibly take action. In these situations, depending on the circumstances, type of proceeding, and other factors that may vary depending on the policy body, the body may be able to conduct the second session of the meeting or hearing without public comment. To ensure that the right of public comment is not compromised in these situations, it is critical that the policy body give the public notice of when there will be an opportunity for public comment, and when there will not. We recommend that the body consult the City Attorney's Office in these situations.

g. The right to comment anonymously

A member of the public has a right to comment anonymously. The presiding officer may request that each speaker fill out a speaker card or state the speaker's name for the record, but may not insist that the speaker disclose his or her identity. See generally Govt. Code § 54953.3; Admin. Code § 67.16. Though not legally required, a policy body may note on its speaker cards that the speaker's name is optional, and may note on its meeting agendas that speakers offering public comment do not have to identify themselves.

h. Responding to public comment

The right to public comment does not include a right to obtain a response from members of the policy body. A speaker may ask questions of the policy body or individual members, but there is no obligation to answer or engage in dialogue with the speaker. Whether it is

appropriate for the presiding officer or other members to respond to speakers on an agenda item may vary with the circumstances, and does not present a legal issue. But during general public comment members of the policy body must take care to avoid a substantial dialogue with speakers if it might reasonably be seen as their discussing an issue that has not been agendized.

Further, a policy body may adopt a rule or practice prohibiting members of the public from directly interrogating individual members of the body during public comment, though it may not prohibit criticism of individual members or rhetorical questions seemingly directed at a member.

i. Public comment and committees

The right of public comment extends to meetings of all policy bodies, including committees of parent bodies. If the parent body limits a committee's authority to hear only those items that the parent body refers to it, then the committee may limit public comment to the items on its agenda. Under these circumstances, the committee is not required to take general public comment on items not listed on the agenda. Persons desiring to speak on non-agenda items within the subject matter jurisdiction of the parent body may address those items at meetings of the parent body. Cal. Govt. Code § 54954.3(a).

With one exception, policy bodies must allow public comment on agenda items that were heard at a meeting of a committee of the body. The Board of Supervisors alone is not required to provide for public comment on items before the full Board where those items were previously considered at a committee meeting or a meeting of the full Board sitting as a committee of the whole, at which public comment was allowed. Cal. Govt. Code § 54954.3; Admin. Code § 67.15(a).

j. Public comment by members of a policy body

Generally, members of a policy body may offer public comment at the meeting of another policy body. Members retain their right to comment publicly on government actions, including those of the policy body on which they sit. Admin. Code § 67.17. Special provisions govern comment by members of the Board of Supervisors at the meeting of another policy body. Charter § 2.114. Concerns about having a meeting that has not been properly noticed may arise if a majority of members of one policy body offer public comment at a meeting of another policy body. Where this possibility is foreseeable, it is advisable to consult the City Attorney's Office in advance.

Members of policy bodies who perform quasi-judicial functions, such as granting or revoking permits, need to exercise care in their public comments, whether before their own body, another body, or in other settings, on specific adjudicative matters. Quasi-judicial bodies must afford a fair hearing to the parties before them. Central to a fair hearing is the principle that decision makers come to the hearing with an open mind, prepared to hear both sides and to decide the case on the merits of the evidence presented and the governing law. A member of a policy body who makes public statements or advocates supporting or opposing a party regarding a matter that the body later hears in a quasi-judicial proceeding could be

vulnerable to a charge that the member is biased on the matter and thus jeopardize the decisionmaking process. Members of such bodies should confer in advance with the City Attorney's Office when these issues arise.

4. The right to obtain materials distributed to the policy body at or before the meeting

As a general rule, meeting agendas and other documents distributed to a majority of the members of a policy body in connection with a matter to be considered at a meeting must be made available to the public. Cal. Govt. Code § 54957.5(a). Further, even if a document has not been distributed to a majority, it must be made available to the public if it is intended to be distributed to a majority in connection with a matter anticipated for discussion or consideration at a meeting, and is on file with the clerk of the policy body. Admin. Code § 67.9(a).

As previously discussed, if documents are distributed to the members of a policy body after they have received the agenda packet, for example, a day or two before the meeting, the documents must be made available at the same time to the public at the departmental office or other designated location, and meeting agendas must contain a notice that states the location where such documents will be publicly available. Cal. Govt. Code § 54957.5(b).

But if a document is otherwise exempt from public disclosure, it typically remains exempt even if distributed to a majority of a policy body. Cal. Govt. Code § 54957.5(a); Admin. Code § 67.9(a). For example, a privileged attorney-client memorandum distributed by the City Attorney's Office to all members of a policy body does not lose its confidential status by virtue of the distribution. Similarly, a memorandum distributed to the body concerning a confidential personnel matter does not become public as a result of the distribution. If questions arise concerning possible disclosure of agenda materials that may be privileged, we recommend consulting the City Attorney's Office before disclosing the materials in question.

The Brown Act provides that records subject to disclosure that are distributed during a meeting of a policy body must be made available for public inspection at the meeting if prepared by City staff or a member of the policy body. Cal. Govt. Code § 54957.5(c). If prepared by some other person, such as a member of the public, they must be made available for public inspection after the meeting. Cal. Govt. Code § 54957.5(c). The Sunshine Ordinance refines these requirements. It provides that records subject to disclosure that are distributed during a meeting but prior to commencement of their discussion must be made available for public inspection prior to commencement of, and during, their discussion. Admin. Code § 67.9(c). Records distributed during their discussion must be made available for public inspection immediately or as soon thereafter as practicable. Admin. Code § 67.9(d).

5. The right of disabled persons to reasonable accommodation

The meetings of all policy bodies must comply with the Americans With Disabilities Act and state disability law. Cal. Govt. Code § 54953.2. This mandate covers all aspects of meetings. In addition, the Brown Act and Sunshine Ordinance contain more specific provisions for the accommodation of disabled persons:

- All policy bodies must, upon request, make available, in appropriate alternative formats, agendas, agenda materials, and writings distributed at meetings. Cal. Govt. Code §§ 54954.1, 54954.2(a)(1), 54957.5(c). Boards and commissions enumerated in the Charter must ensure that agendas are made available to sight-impaired persons through Braille or enlarged type. Admin. Code § 67.7(f).
- Boards and commissions enumerated in the Charter must provide sign language interpreters or note-takers at each regular meeting if the body has received a request for such services at least 48 hours before the meeting. Where the body meets on a Monday, the request for such services must be made by 4:00 p.m. on the last business day of the preceding week. Admin. Code § 67.13(b).
- Boards and commissions enumerated in the Charter must ensure that accessible seating for persons with disabilities, including those using wheelchairs, is made available for each regular and special meeting. Admin. Code § 67.13(c).
- As previously noted, all policy bodies must hold their meetings in facilities that are accessible to disabled persons. Cal. Govt. Code § 54961(a); Admin. Code § 67.13(a).

These provisions should not be construed to limit the duty of all policy bodies to adhere fully to the requirements of federal and state disability law. Disability law questions may arise in many different factual settings. Where questions arise, we recommend that departments consult with the City Attorney's Office in advance to ensure that meetings of bodies will be noticed and conducted in a manner that fully complies with disability law.

F. Records of meetings

1. Audio recordings

Each board or commission listed in the Charter must audio record regular and special meetings. Admin. Code § 67.14(b). Other policy bodies are not required to audio record their meetings, except for closed session portions of meetings. Admin. Code § 67.8-1(a).

When a policy body tapes a meeting, even if taping is not required, the tape becomes a public record and may not be erased or destroyed. Cal. Govt. Code § 54953.5(b); Admin. Code § 67.14(b). Tapes of closed sessions must be retained for at least 10 years, or permanently if possible. Admin. Code § 67.8-1(a).

A policy body may not charge a member of the public to listen to a tape recording or watch a video recording of a meeting. Inspection of recordings shall be provided without charge

on equipment made available by the City. Cal. Govt. Code § 54953.5(b); Admin. Code § 67.14(b). As with any public record, policy bodies may charge for copies of a tape recording or video recording.

2. Minutes

The Brown Act imposes no requirements on policy bodies regarding minutes of meetings. Only local law imposes requirements, which vary greatly depending on the type of policy body.

a. Appointive boards, commissions, and other units of government in the executive branch

The Charter requires each appointive board, commission, or other unit of government in the executive branch to keep a “record” of the proceedings of each regular or special meeting. The record must include how each member voted on each question. Charter § 4.104(a)(3). The Charter does not otherwise require specific information to be in the record.

b. Charter boards and commissions

The Sunshine Ordinance imposes detailed requirements for meeting minutes of boards and commissions listed in the Charter. These requirements do not apply to other policy bodies. The clerk or secretary for Charter boards and commissions must record the minutes of each meeting and include certain information in the minutes:

- The beginning time of the meeting.
- The ending time of the meeting.
- The names of the members in attendance.
- The roll call vote on each matter considered.
- A list of those members of the public who spoke on each matter who identified themselves, whether the speaker supported or opposed the matter, and a brief summary of the speaker’s public comment.

Admin. Code § 67.16. As discussed earlier in this Guide, when a City officer or employee has disclosed on the record a personal, professional, or business relationship as required by Section 3.214 of the Campaign and Governmental Conduct Code, that disclosure must be recorded in the minutes.

If the Charter body held a closed session, the minutes must also include:

- The beginning time of the closed session.
- The ending time of the closed session.
- The members of the policy body and others, identified by name and title, in attendance at the closed session.

Admin. Code § 67.16. But the name of a person whose presence in the closed session may be kept confidential, such as a candidate for appointment interviewed in a closed session, need not be disclosed. In such a case, the minutes should note the person's presence in the closed session, without identifying the person.

The Sunshine Ordinance allows any person who spoke during a public comment period at a meeting of a Charter board or commission to supply a brief written summary of the comments to be included in the minutes if it is 150 words or less. Admin. Code § 67.16. The summary is not part of the body's official minutes, nor does the body vouch for its accuracy; and the minutes may expressly so state. The policy body may reject the summary if it exceeds the prescribed word limit or is not an accurate summary of the speaker's public comment.

The speaker's summary of public comment may be placed in the text of the minutes for the agenda item (or for general public comment, if that is when the comment occurred), or at the end of the minutes, whether or not designated as an attachment. If the summary is placed at the end of the minutes, we recommend as a sound practice though not a legal requirement that the text of the minutes for the agenda item (or for general public comment) cross-reference the attachment, to direct the reader to the summary.

Draft minutes of each meeting of a Charter board or commission must be available for public inspection and copying no later than 10 business days after the meeting. The officially adopted minutes must be available for inspection and copying no later than 10 business days after the meeting at which the minutes are adopted. If requested to do so, the body must produce the minutes in Braille or enlarged type. Admin. Code § 67.16.

c. Other policy bodies

Policy bodies that do not fit into one of the above two categories, such as purely advisory bodies and committees of parent bodies, are not required to keep meeting minutes or maintain a record of meetings. But we strongly advise that such bodies maintain brief minutes of meetings to record attendance by members, actions taken, and votes on those actions. Otherwise, questions may arise as to the accuracy of informal or unofficial reports regarding the meetings of such bodies and actions taken at such meetings.

d. Other issues pertaining to minutes

Except as has been noted above, there are no other legal requirements for the content of minutes. There are variations among policy bodies in the style, length, and detail of the minutes of their respective meetings.

While not all policy bodies are required to keep minutes, certain rules apply to any policy body that does. Each policy body must send two copies of its minutes to the Government Information Center at the San Francisco Public Library. Admin. Code § 8.16. Minutes must also be posted on the body's website within 48 hours after approval, and thus typically will then be available for inspection and copying. Admin. Code § 67.29-2.

It is customary, but not legally required, that minutes of a meeting be considered and adopted at the next meeting of the policy body. Sometimes policy bodies adopt the minutes at a later meeting.

A member of a policy body may vote on approval of minutes of a meeting even though the member did not attend that meeting. A policy body may but is not required to excuse a member from voting to approve minutes for a meeting that the member did not attend.

G. Closed sessions

The Brown Act and Sunshine Ordinance recognize that under limited circumstances a policy body may best consider certain matters in nonpublic sessions, commonly called closed sessions. Closed sessions are the exception to the general rule requiring public meetings. These exceptions are strictly limited. While members of a policy body may find it awkward or even counterproductive to consider certain matters in public, the body must do so unless the law allows a closed session. For example, while there are good arguments that a policy body should be able to hold a closed session to instruct its negotiator regarding a prospective contract for goods and services, there can be no closed session for this purpose because the Brown Act does not authorize such a closed session.

Holding a closed session is usually a choice of the policy body. No member of the public has the right to demand a closed session. And even where the policy body may meet in closed session, the law usually does not require it to do so. But in limited instances State or federal law requires policy bodies to keep certain matters confidential, in which case the body must meet in a closed session to discuss such matters. For example, federal laws on medical privacy, as well as the state constitutional right of privacy, may effectively require a policy body to hold a closed session to the extent the body must discuss an individual's medical condition in connection with an agenda item.

We first address general principles pertaining to closed sessions, then discuss the most common types of closed sessions.

1. General principles

a. Notice and agenda requirements

A meeting of a policy body in closed session is subject to most of the requirements of the Brown Act and Sunshine Ordinance, including public notice and agendas. These laws require policy bodies to include certain information on the agenda for closed session items. See generally Cal. Govt. Code § 54954.5; Admin. Code §§ 67.8, 67.8-1(b). The special notice provisions pertaining to the most common types of closed sessions are:

- Personnel matters – Cal. Govt. Code § 54954.5(e); Admin. Code § 67.8(a)(4).
- Pending litigation – Cal. Govt. Code § 54954.5(c); Admin. Code §§ 67.8(a)(3), 67.8-1(b).
- Real estate negotiations – Cal. Govt. Code § 54954.5(b); Admin. Code § 67.8(a)(2).

- Labor negotiations – Cal. Govt. Code § 54954.5(f); Admin. Code § 67.8(a)(5).
- Security matters – Cal. Govt. Code § 54954.5(e); Admin. Code § 67.8(a)(4).

Where it is unclear in advance of the meeting whether a closed session will be warranted, or whether the body will wish to have a closed session, we recommend that the agenda give notice of a potential closed session to preserve that option. In such a circumstance it is helpful although not legally required for the notice to explain that the policy body may but not necessarily will go into closed session.

Because of the specialized nature of closed session agenda requirements, except in routine circumstances we recommend consulting the City Attorney's Office when drafting agendas for closed sessions. In many cases closed session agenda descriptions may pose difficult challenges for which legal advice would be helpful.

Before going into a closed session, the policy body must first meet in open session to publicly announce its intent to hold a closed session and state the grounds for the closed session. Admin. Code § 67.11. Reading the agenda notice for the closed session will suffice as the announcement.

In the closed session, the policy body may consider only those matters listed on the agenda. Admin. Code § 67.11. Policy bodies must guard against consideration in the closed session of matters that are related to the subject of the closed session, but are beyond what the law allows the body to discuss in the closed session.

b. Public comment requirements

Before holding a closed session, the policy body must meet in open session to take public comment. Cal. Govt. Code § 54954.3. This opportunity for public comment should extend to all items on the closed session agenda including the question whether the body should go into closed session.

c. Deciding to go into closed session

For closed sessions on pending litigation, policy bodies must vote on whether to go into closed session. Admin. Code § 67.10(d). For other types of closed sessions, the law does not require a vote to go into closed session, although a body may adopt a rule requiring such a vote or adhere to a custom of having a vote.

d. Attendance at closed sessions

If the policy body meets in closed session, it may not permit any members of the public to attend. The presence of unauthorized members of the public in the closed session waives the privilege to preserve the confidentiality of the session and could render the closed session unlawful.

But the policy body may admit persons whose assistance it needs to conduct the business prompting the closed session. For example:

- In a closed session to evaluate the performance of an employee, the policy body may invite the employee and the employee's representative to participate in the proceeding.
- In a closed session to consider hiring a department head, the policy body may interview candidates for the position and their references.
- In a closed session on pending litigation, the policy body may include an expert witness to evaluate evidence bearing on the legal issues under discussion with the body's counsel.
- In a closed session for real estate negotiations, the policy body may include an appraiser whose analysis of the economic value of the parcel in question will assist the body in instructing its negotiator on the price range that would be acceptable for the sale or lease of the property.
- In a closed session for labor negotiations, the policy body may include legal counsel to advise on the permissible scope of collective bargaining.

e. Confidentiality of closed sessions

Individual members of a policy body may not, without authorization from the body, disclose information obtained during the closed session or the substance of the discussion that occurred in closed session. Only the policy body acting as an entity, and subject to state and federal law requiring confidentiality of specific information or records, may determine whether to disclose information obtained in the closed session or the substance of the discussion. Unauthorized disclosure by a member of the policy body or staff person violates the law and may potentially lead to disciplinary action such as removal from office. Cal. Govt. Code § 54963.

A member of the policy body who was absent from a closed session may listen to the tape of the closed session or discuss the closed session with someone who was present, but is subject to the same confidentiality obligations as those who were present. If a conflict of interest or other legal bar precludes a member from participating in the body's consideration of the item that is the subject of the closed session, the member should not attend the closed session, listen to the tape recording, or otherwise gain knowledge of information the body obtained in closed session or the discussion that took place.

The policy body, as an entity, has the right to make public the content of the closed session. Therefore, a change in the membership of the policy body does not affect the right to order disclosure of the content of the closed session. Indeed, policy body members should recognize that a change in membership could itself trigger a decision by the body to disclose.

Because dominion over the closed session rests with the policy body rather than the individual members who participated in the closed session, a person who becomes a member of the body after the closed session took place may listen to the tape or discuss the closed session with someone who was present, subject to the same confidentiality restrictions that apply to members who were present.

f. Reporting on closed sessions

After a closed session, policy bodies must return to open session. If the body took certain actions in closed session, it must publicly report the action taken and the vote of each member. Cal. Govt. Code § 54957.1; Admin. Code § 67.12(b). This disclosure requirement applies only to those actions specified in the above provisions of State and local law. In certain circumstances, as discussed below, policy bodies may defer disclosing the action taken.

By the close of business on the next business day following the meeting, the policy body must post, where it posts its agendas, a written summary of actions the body must disclose or documents embodying that information. Admin. Code § 67.12(d). On that same business day, it must make available to the public any contracts, settlement agreements, or other documents that the body finally approved or adopted in the closed session, except if substantial amendments necessitate retyping that is not completed by then. Cal. Govt. Code § 54957.1(c).

In addition, the policy body must provide contracts, settlement agreements, or other documents finally approved in the closed session to any person who is present when the closed session ends and who requests the document, if the person made an advance request or a standing request for such documents. Cal. Govt. Code § 54957.1(b); Admin. Code § 67.12(c). If the body substantially amends these documents so that retyping is required, it need not release them until the retyping is done, but the presiding officer or a designee must orally summarize the substance of the amendments for the requester or any other person present and requesting the information. Cal. Govt. Code §§ 54957.1(b).

g. Voting on disclosure of closed session discussion

After a closed session, every policy body must, by motion and vote in open session, decide whether to disclose any or all of its discussion, provided that disclosure would not violate federal, state, or local law. Admin. Code § 67.12(a). The body may elect to disclose no information. The presiding officer or a designee of the presiding officer who attended the closed session must make any such disclosure. Admin. Code § 67.12(a). The body may choose to disclose the general nature of the closed session without disclosing specifics, so long as the disclosure is otherwise lawful.

h. Recordings of closed sessions

As previously noted, all policy bodies must audio record closed sessions and retain the recordings for at least 10 years, or permanently where technologically and economically feasible. Admin. Code § 67.8-1(a). Policy bodies must make these recordings available whenever all rationales for closing the session are no longer applicable. Admin. Code § 67.8-1(a). But one or more rationales for a closed session often may extend well into the future. Given the importance the law places on the confidentiality of closed sessions, and because the body rather than departmental staff has ultimate responsibility for the confidentiality of the closed session, we recommend that staff consult the City Attorney's Office before disclosing a closed session recording.

In cases of closed sessions to consider anticipated litigation, the public has the right of access to the recording (1) two years after the meeting if no litigation is filed, (2) upon expiration of the statute of limitations if the anticipated litigation has not been filed, or (3) as soon as the controversy leading to the anticipated litigation is settled or concluded. Admin. Code § 67.8-1(a). We ask that a policy body contact the City Attorney's Office before disclosing any recordings of closed sessions involving anticipated litigation, to make sure that one of these grounds applies. We likewise request that this Office be contacted whenever there is a request to disclose a recording of any closed session involving actual litigation.

i. Minutes of closed sessions

Policy bodies may but are not required to keep minutes of what transpired in closed sessions. Cal. Govt. Code § 54957.2(a). Such minutes are confidential. Cal. Govt. Code § 54957.2(a). But, as previously noted, the Sunshine Ordinance requires Charter boards and commissions to record in their public minutes certain basic information regarding closed sessions. Admin. Code § 67.16.

j. Holding multiple closed sessions in one meeting

Sometimes a policy body will have closed sessions on more than one agenda item during the same meeting. If these closed sessions are held consecutively, the body need not physically go into and come out of each of the closed sessions, although it has that option. It may physically go into closed session once, address each of the agenda items, and then come out of closed session when the last of those agenda items is concluded.

If this approach is taken, the closed session on each agenda item must be properly conducted on its own terms. As a general rule, the agenda items should not be intermixed in closed session; the policy body should conclude its consideration of the first closed session item before beginning its consideration of the second. The confidentiality rules must be applied distinctively to each of the agenda items. For example, if the first item concerns a personnel evaluation and the second a real estate negotiation, it would not be lawful for the real estate negotiator to attend the closed session on the first item, or for the employee subject to the personnel evaluation to attend the closed session on the second item.

To maintain the distinctiveness of each of the agenda items, we recommend that, upon coming out of closed session, the policy body have separate motions and votes, for each of the agenda items, regarding disclosure of closed session discussion. In some cases it may also be advisable that separate tape recordings be made of each of the closed session items. These recommendations are not legal requirements but are desirable approaches to make clear to the public that the policy body is following the law in its conduct of closed sessions.

2. Common types of closed sessions

City policy bodies most often use closed sessions for personnel matters, pending litigation, real estate negotiations, labor negotiations, and security matters. We discuss below these exceptions to the principle of open meetings.

a. The personnel exception

Policy bodies may meet in closed session to discuss or act on the appointment, employment, promotion, discipline, dismissal, or evaluation of any officer or employee, if the body has the power to appoint, employ, dismiss, or discipline that person. Cal. Govt. Code § 54957(b); Admin. Code § 67.10(b). Appointment or employment of an employee may include more than initial hire; it may include evaluation of an employee's fitness for duty following a leave, or following dismissal. Evaluation of an employee may include more than a formal or regular process such as an annual performance evaluation; it may include evaluation of the employee's performance regarding an incident involving that employee, or a specific matter within the employee's responsibilities.

The power to meet in closed session for these varied purposes also extends to bodies that have a role in making these decisions. For example, a committee of a policy body may meet in closed session to review and recommend candidates for appointment as department head, even though the committee's role is advisory.

Policy bodies typically have the authority to make personnel decisions regarding only the department head and the commission secretary. Hence most policy bodies may not meet in closed session to discuss the work performance of most departmental employees. But there are exceptions to this principle. For example, the Charter gives police officers and firefighters the right to a trial before their commissions regarding certain disciplinary actions. Charter § A8.343. Accordingly, those commissions typically meet in closed session to consider discipline of police officers and firefighters. Unless a police officer consents to an open hearing on disciplinary charges, state-mandated confidentiality of peace officer personnel records effectively requires a closed session. Cal. Penal Code §§ 832.7, 832.8.

The purpose of the personnel exception is to enable policy bodies to protect the privacy of individuals subject to specific types of personnel decisions, and to foster candid deliberations concerning such individuals. Therefore, policy bodies may not meet in closed session to discuss a department's general personnel operations or policies. Also, as a general rule, a policy body may not hold a closed session to discuss the process or criteria for the selection of a department head, or the general criteria for evaluating a department head. These issues typically do not focus on a particular individual. But to the extent criteria for evaluation of the department head turn on that person's distinctive traits rather than on general factors that would apply to any head of that department, the body may discuss and develop criteria in closed session.

A policy body must conduct discussion of salary, even if keyed to a specific person, in public, except for consideration of a reduction in compensation resulting from imposition of discipline. Cal. Govt. Code § 54957(b)(4). But under the labor negotiations exception, discussed at Section IV(H)(2)(d) below, a body may meet in closed session to instruct its negotiator regarding compensation for unrepresented as well as represented employees. In such a case, the agenda must identify the item as involving labor negotiations rather than a personnel matter. The person whose salary is being negotiated may not attend the closed session. As noted earlier, discussion of a department head's salary, even if in closed session, may not occur as part of a special meeting. Cal. Govt. Code § 54956(b).

When a policy body calendars a closed session to discuss specific charges or complaints against an employee, it must notify the employee at least 24 hours before the meeting. The body's failure to give the notice will invalidate any discipline it imposes. Cal. Govt. Code § 54957(b)(2). Evaluation of an employee's work performance, even if it includes criticisms, does not generally constitute a discussion of specific charges or complaints against the employee. But a body's discussion of serious misconduct may constitute discussion of a specific charge or complaint, triggering the 24-hour notice requirement. An employee has the right to demand a public hearing on specific charges or complaints that the body has calendared for a closed session, but may not demand that the body conduct its deliberations in public. An employee does not have the right to demand that the policy body meet in closed session if the body has determined it is appropriate to conduct the meeting in public. Cal. Govt. Code § 54957(b); Admin. Code § 67.10(b).

Because independent contractors are not employees, policy bodies may not meet in closed session to discuss the employment or termination of an independent contractor. Similarly, because the personnel exception does not cover members of policy bodies, a body may not meet in closed session to elect officers, or consider the composition of a committee of the body, or consider complaints regarding a member of the body. Cal. Govt. Code § 54957(b)(4); Admin. Code § 67.10(b).

Both the Brown Act and Sunshine Ordinance include closed session agenda formats for personnel matters. Cal. Govt. Code § 54954.5(e); Admin. Code § 67.8(a)(4). Among other things, the agenda must identify the type or types of personnel actions the policy body may consider in the closed session, and the body is bound to that agenda description. For example, a notice of a closed session for performance evaluation of an official or employee will not enable the body to consider discipline or dismissal, except to determine whether to schedule a second closed session for the purpose of considering those actions.

After the closed session, the policy body must return to open session and report (1) any action taken to appoint, employ, dismiss, transfer, or accept the resignation of a public employee, (2) the roll call vote, (3) the name of the employee, (4) the position affected, and (5) the reason for dismissals for a violation of law or City policy. Cal. Govt. Code § 54957.1(a)(5); Admin. Code § 67.12(b)(4). As previously noted, the body must comply with requirements for the posting and notice of such actions. Cal. Govt. Code §§ 54957.1(b), (c); Admin. Code §§ 67.12(c), (d). In limited circumstances, privacy considerations may preclude naming an employee who has been dismissed. Before considering such a departure from the prescribed disclosures, the policy body should consult the City Attorney's Office.

The law does not require disclosure of the closed session evaluation of an employee or discipline short of dismissal imposed during the closed session. Given privacy considerations, we recommend that policy bodies not disclose such actions after a closed session without first consulting the City Attorney's Office.

The Charter requires the Mayor to appoint many department heads from candidates the policy body has nominated. Charter §§ 3.100(18), 4.102(5). Given its role in the

appointment process, the policy body may meet in closed session to nominate candidates. But it need not publicly report its nominations until the first meeting after the Mayor announces the new department head, when the body must report the closed session's roll call vote for the Mayor's appointee and post written notice of that action by the next business day. The policy body is not required to disclose the identity of unsuccessful nominees.

b. The pending litigation exception

Policy bodies may meet in closed session with their attorneys regarding "pending litigation" when discussion in open session would prejudice the City's position in the litigation. Cal. Govt. Code § 54956.9(a); Admin. Code § 67.10(d). This exception does not permit a policy body to meet in closed session merely to get advice from its attorney on a non-litigation matter. Cal. Govt. Code § 54956.9(b). Nor does it permit the body to meet in closed session to consider the qualifications or engagement of an independent contract attorney or law firm, for litigation services or otherwise. Admin. Code § 67.10(d)(3).

Counsel for the policy body must be present in a closed session held under the pending litigation exception. Neither an adverse party nor that party's attorney may attend. Further, the closed session may not be used to negotiate with an opposing party.

For purposes of this exception, "litigation" does not only mean court proceedings. It includes any adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator. Cal. Govt. Code § 54956.9(c). Further, litigation is considered "pending" in any of the following three circumstances:

- Actual litigation where the City is a party; that is, an adjudicatory proceeding in which the City is a party has been initiated formally. Cal. Govt. Code § 54956.9(d)(1).
- Potential litigation with the City as defendant; that is, a point has been reached where, in the policy body's opinion on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation; or the policy body is deciding whether a closed session is authorized under this rationale. Cal. Govt. Code §§ 54956.9(d)(2), (3). A remote possibility of litigation against the City does not generally warrant a closed session. But the law does not require a near certainty of litigation against the City to hold a closed session. Though incapable of precise definition, "significant" exposure to litigation is the key.
- Potential litigation with the City as plaintiff; that is, the policy body has decided or is deciding whether to initiate litigation based on existing facts and circumstances. Cal. Govt. Code 54956.9(d)(4).

Considering whether the City should intervene in a case or participate as an *amicus curiae* is included in potential litigation involving the City as a party, and thus may be considered in closed session. See Cal. Govt. Code § 54957.1(a)(2); Admin. Code § 67.12(b)(2).

"Existing facts and circumstances" for the purpose of determining if the City has a significant exposure to litigation are limited to the following situations. As noted below, requirements for disclosing those facts and circumstances vary:

- Facts and circumstances that might result in litigation against the City but that the City believes are not yet known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed. Cal. Govt. Code § 54956.9(e)(1).
- Facts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the City and that are known to a potential plaintiff or plaintiffs, which facts or circumstances shall be publicly stated on the agenda or announced. Cal. Govt. Code § 54956.9(e)(2).
- The receipt of a claim under the Tort Claims Act or some other written communication from a potential plaintiff threatening litigation, which claim or communication shall be available for public inspection. Cal. Govt. Code § 54956.9(e)(3).
- A statement made in an open and public meeting threatening litigation on a specific matter within the responsibility of the policy body. Cal. Govt. Code § 54956.9(e)(4).
- A statement threatening litigation, made outside an open and public meeting, on a specific matter within the responsibility of the policy body, so long as the City official or employee aware of the threat makes a record of the statement before the meeting, which record shall be available for public inspection. Cal. Govt. Code § 54956.9(e)(5).

Before holding a closed session under the pending litigation exception, the policy body must vote, in open session, to invoke the attorney-client privilege to hold the closed session. Admin. Code § 67.10(d).

The policy body must disclose on the agenda the legal basis for the closed session. If the agenda indicates that the closed session will address formally initiated litigation to which the City is a party, the agenda must state the case name, court, case number, and the date the case was filed, except if the agenda states that to do so would jeopardize the City's ability to (1) effectuate service of process on one or more unserved parties or (2) conclude existing settlement negotiations to the City's advantage. Both the Brown Act and Sunshine Ordinance detail the requirements for noticing a closed session on pending litigation. Cal. Govt. Code § 54954.5(c); Admin. Code §§ 67.8(a)(3); 67.8-1(b). Where a policy body with final decision-making power is holding a closed session to discuss a potential settlement of litigation, the agenda must include the names of the parties, the case number, the court, and the material terms of the settlement. Admin. Code § 67.12(b)(3).

In addition, where a settlement would commit the City or a department to adopting, modifying, or discontinuing an existing policy, practice, or program, or to paying an amount of money equal to or more than \$50,000, the policy body must disclose any written settlement agreement and any documents attached to or referenced in the settlement agreement at least 10 days before the closed session. Where the disclosure of documents in a litigation matter that has been settled could be detrimental to the City's interest in pending litigation arising from the same facts or incident and involving a party not a party to or otherwise aware of a settlement, the City may withhold disclosure until the other case is settled or otherwise finally concluded. Admin. Code § 67.12(b)(3).

After holding the closed session, the policy body must return to open session and report any approval given to legal counsel to prosecute, defend, seek or refrain from seeking appellate review or relief, or enter as a party, intervenor, or *amicus curiae* in any form of litigation. The report shall identify the adverse party or parties, any co-parties with the City, any existing claim or order to be defended against, or any factual circumstances or contractual dispute giving rise to the City's complaint, petition, or other litigation initiative. Cal. Govt. Code §§ 54957.1(a)(2), (3); Admin. Code § 67.12(b)(2). As previously noted, there are additional requirements for the posting and notice of such actions by the close of the next business day. Cal. Govt. Code §§ 54957.1(b), (c); Admin. Code §§ 67.12(c), (d).

The policy body may defer giving its report if immediate disclosure of the City's intentions would be contrary to the public interest. In those instances, the body may wait to report until the first meeting after the adverse party or parties have been served in the matter. Cal. Govt. Code § 54957.1; Admin. Code § 67.12(b)(2). See also Cal. Govt. Code § 54957.1(b)(2).

c. The real estate negotiations exception

A policy body may hold closed sessions with its real estate negotiator before the City's purchase, sale, exchange, or lease (including a lease renewal or renegotiation) of real property, to grant authority to the negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease. Cal. Govt. Code § 54956.8; Admin. Code §§ 67.8(a)(2), 67.12(b)(1). The permissible scope of closed session discussion will depend on the facts and circumstances that relate to price and terms of payment for each prospective real estate transaction. Because this standard is imprecise, the line between permissible and impermissible closed session discussion under this exception may in some cases be unclear. We recommend that the policy body consult the City Attorney's Office when questions arise concerning the permissible scope of closed session discussion. This exception does not limit the authority of policy bodies to hold a closed session regarding an eminent domain proceeding under the pending litigation exception. Cal. Govt. Code § 54956.8.

Before holding a closed session under the real estate negotiations exception, the policy body must hold an open session in which the body identifies its negotiator(s), the real property or properties involved, and the person(s) with whom the City may negotiate. Cal. Govt. Code § 54956.8. The negotiator may but need not be a member of the policy body. Cal. Govt. Code § 54956.8. An agent or designee of the negotiator may appear for the negotiator, so long as the body publicly announces the name of the person before going into closed session. Cal. Govt. Code § 54954.5(b).

Both the Brown Act and Sunshine Ordinance include formats for agendaizing a closed session for real estate negotiations. Cal. Govt. Code § 54954.5(b); Admin. Code § 67.8(a)(2). The agenda must disclose the street address, if one exists, for the property. If the property does not have a street address, the agenda must include the parcel number or other unique description. But if there is a manner of identifying such a property in addition to parcel number that will convey its location in a more meaningful way, that description should also be included on the agenda.

After the closed session and once the agreement is final, the policy body must publicly report any approval given to the negotiator. If the body's own approval renders the agreement final, the body shall immediately report that approval, the substance of the agreement, and the vote taken. If final approval rests with the other party, the body shall make the disclosure on its website and at the next meeting, once the other party has informed the body of its approval. Notwithstanding the final approval, if there are conditions precedent to the final consummation of the transaction, or there are multiple continuous or closely located properties that are being considered for acquisition, the City need not disclose the agreement until the conditions are satisfied or the City has reached agreement for all of the properties, or both. Cal. Govt. Code § 54957.1(a)(1); Admin. Code § 67.12(b)(1). As previously noted, there are additional requirements for the posting and notice of actions taken in closed session by the close of the next business day following the meeting at which such actions must be disclosed. Cal. Govt. Code §§ 54957.1(b), (c); Admin. Code §§ 67.12(c), (d).

d. The labor negotiations exception

A policy body may meet in closed session with the City's designated representatives to give negotiating instructions regarding collective bargaining or meeting and conferring with public employee organizations or with unrepresented employees so long as the body has authority over such matters. Cal. Govt. Code § 54957.6; Admin. Code § 67.10(e).

Both the Brown Act and Sunshine Ordinance include formats for agendizing a closed session for labor negotiations. Cal. Govt. Code § 54954.5(f); Admin. Code § 67.8(a)(5). Among other things, the notice must identify the City's labor negotiator(s). The negotiator may but need not be a member of the policy body. An agent or designee of the negotiator may appear for the negotiator so long as the body publicly announces the name of the person before the body goes into closed session. Cal. Govt. Code § 54954.5(f).

The City must make any collectively bargained agreement available to the public at least 15 calendar days before the meeting of the policy body to which the agreement is to be reported. Admin. Code § 67.12(b)(5).

e. The security exception

Policy bodies may meet in closed session on matters posing a threat to the security of or the public's access to public buildings, services, or facilities. Cal. Govt. Code § 54957(a); Admin. Code § 67.10(a). The threat need not be imminent for the body to go into closed session. Nor must the body have reason to believe there is a specific plot against the building or facility in question. For example, if a building's design features render it vulnerable to attack, and a public discussion of those design features would alert a would-be terrorist to the building's vulnerabilities, that discussion may occur in closed session under this exception. Consideration of a threat to the safety of a public official may occur in closed session under the security exception, because typically such a threat will at least indirectly endanger the public's access to public buildings, services, or facilities.

The Brown Act describes the scope of security matters that a policy body may address in a closed session with greater specificity than the Sunshine Ordinance, by mentioning a threat

to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service. Cal. Govt. Code § 54957(a). But these types of threats are encompassed within the more general language of the Sunshine Ordinance.

The Sunshine Ordinance states that a closed session under the security exception must include the Attorney General, District Attorney, Sheriff, or Chief of Police, or their respective deputies. Admin. Code § 67.10(a). The Brown Act also authorizes such closed sessions with agency counsel, a security consultant, or a security operations manager. Cal. Govt. Code § 54957(a). Because the Ordinance does not mention those persons, the policy body should not meet with them alone, but should also include in the closed session at least one of the persons mentioned in the Ordinance. The agenda description for the closed session must identify by name, title, and agency the law enforcement officer(s) attending the closed session. Cal. Govt. Code § 54954.5(e); Admin. Code § 67.8(a)(4)

In contrast to most types of closed sessions, the law does not require reporting any action that the policy body takes in closed session under the security exception.

f. Miscellaneous exceptions

Policy bodies may also meet in closed session in other limited circumstances, for example, (1) to consider license applications by persons with criminal records (Cal. Govt. Code § 54956.7); (2) to consider the purchase or sale of specific pension fund investments (Cal. Govt. Code § 54956.81); and (3) for other special, limited circumstances, such as when a commission must consider a matter that is confidential under state or federal law. If there are questions about whether one of these or other exceptions might apply in a particular situation, we recommend that the policy body consult in advance with the City Attorney's Office.

H. Passive meeting bodies

The Sunshine Ordinance imposes open government requirements on “passive meeting bodies” that the Brown Act does not regulate and that are not policy bodies. We first discuss the types of entities that are passive meeting bodies, then the rules that apply to gatherings of such bodies.

1. Types of passive meeting bodies

Gatherings of the following types of groups are subject to the passive meeting body rules:

- Advisory committees or other multimember bodies created in writing, or by the initiative of, a member of a policy body, the Mayor, the City Administrator, a department head, or any elective officer. Admin. Code §§ 67.3(c)(1); 67.4(a)(5).
- A social, recreational, or ceremonial occasion sponsored or organized by or for a policy body to which a majority of the body has been invited. Admin. Code §§

67.3(c)(3), 67.4(a)(5). Spectators at such gatherings are not entitled to refreshments or food. Admin. Code § 67.4(a)(4).

- Committees created by the initiative of a member of a policy body, the Mayor, or a department head, consisting solely of City employees, that are reviewing, developing, modifying, or creating City policies or procedures relating to public health, safety, or welfare, or to services for the homeless. Admin. Code § 67.3(c)(5).

Other committees consisting solely of City employees, even if created at the initiative of a member of a policy body, the Mayor, or a department head, are not passive meeting bodies. Admin. Code § 67.3(c)(4). As previously discussed, any committee that the Charter or an ordinance, resolution, or other formal action of a policy body creates or initiates is itself a policy body subject to the requirements of the Brown Act and Sunshine Ordinance. A committee of employees formed in this manner is a policy body.

In many cases, the existence of a passive meeting body will hinge on who created it or initiated its creation. For example, a division manager in a large department creates a committee comprised of employees in that department. The committee, even if tasked with developing a City policy affecting public health, safety, or welfare, would not be a passive meeting body. But if the division manager acts at the initiative of the department head, the committee is a passive meeting body, even if the division manager creates and appoints people to the committee.

2. Rules for passive meeting body gatherings

Gatherings of passive meeting bodies are not subject to the broad array of open government requirements that apply to policy bodies. Such gatherings are subject to a limited number of requirements:

- They must be open to the public. Admin. Code §§ 67.4(a), (a)(2). But such gatherings need not occur in any particular space for accommodation of members of the public. Rather, the public has the right to observe on a space available basis consistent with legal and practical restrictions on occupancy. Admin. Code § 67.4(a)(2).
- They must occur in facilities that are accessible to the disabled.
- They must be noticed on the City's website whenever possible. Admin. Code § 67.4(a)(1). There is not a strict time deadline for posting this notice, but if possible the department should post it to allow reasonable time for interested members of the public to arrange to attend.
- If a member of the public requests the time, place, and nature of an upcoming gathering, that information must be disclosed. Admin. Code § 67.4(a)(1).
- If there is an agenda and a member of the public requests the agenda, it must be disclosed. Admin. Code § 67.4(a)(1).

Among the most basic requirements applicable to meetings of policy bodies that do not apply to gatherings of passive meeting bodies are the following:

- There is no right of public comment. Admin. Code § 67.4(a)(3).
- There is no agenda requirement, much less a requirement to post an agenda. And even if an agenda has been prepared, it need not be followed.

The Sunshine Ordinance specifies that passive meeting bodies may gather in closed session to the same extent as policy bodies. Admin. Code § 67.4(a)(6). But, as a practical matter, there will be few if any occasions where a closed session for a passive meeting body could meet the exacting legal requirements for holding a closed session.

The Ordinance is otherwise silent regarding many of the types of issues affecting policy bodies that are discussed in this Guide. Where questions arise concerning the operation of passive meeting bodies, consultation with the City Attorney's Office may be appropriate.

VI. Remedies and penalties for violations of the Brown Act, Public Records Act, and Sunshine Ordinance

City employees and officials must place a high priority on compliance with open government laws. The Brown Act, Public Records Act, and Sunshine Ordinance provide substantial remedies and penalties for violation of their provisions. And the cost in money and staff resources that must be devoted in administrative or judicial proceedings to defending against alleged violations of these laws can be substantial.

A. Violations of the Brown Act

1. Criminal penalty for willful violations

Each member of a policy body who attends a meeting of the body where an action is taken in violation of the Brown Act, with the intent to deprive the public of information to which the public is entitled, is guilty of a misdemeanor. Cal. Govt. Code § 54959.

2. Invalidation of certain actions

Courts may void an action taken by a policy body that violates certain provisions of the Brown Act:

- Cal. Govt. Code § 54953 (requirement that meetings be open to the public; rules for teleconferenced meetings; prohibition of secret ballots).
- Cal. Govt. Code § 54954.2 (requirements for posting and adhering to agendas for regular meetings).
- Cal. Govt. Code § 54954.5 (agenda requirements for closed sessions).

- Cal. Govt. Code § 54954.6 (detailed requirements, not discussed in this Guide, for public meetings and hearings regarding any new or increased general tax or new or increased assessment).
- Cal. Govt. Code § 54956 (notice and other requirements for special meetings).
- Cal. Govt. Code § 54956.5 (notice and other requirements for emergency meetings).

Cal. Govt. Code § 54960.1(a). Courts may not void actions taken in violation of other Brown Act provisions. And even as to actions taken in violation of the enumerated sections, there are limits on the ability of courts to void the action, as outlined below.

First, this judicial remedy is unavailable if the policy body violates one of the Brown Act sections enumerated above but substantially complies with the law. Cal. Govt. Code § 54960.1(d)(1). Whether there has been substantial compliance in a particular case will depend on the facts and circumstances.

Second, courts may not void certain types of actions, even when the violation of the enumerated section is clear and significant. Cal. Govt. Code § 54960(d). Actions that may not be voided include:

- Actions taken in connection with the sale or issuance of notes, bonds, or other evidence of indebtedness, or any related contract, instrument, or agreement (Cal. Govt. Code § 54960.1(d)(2)).
- Actions taken giving rise to a contractual obligation, other than certain personal services contracts, where a party in good faith has detrimentally relied on the action taken (Cal. Govt. Code § 54960.1(d)(3)).
- Actions taken in connection with the collection of any tax (Cal. Govt. Code § 54960.1(d)(4)).
- For certain of the enumerated violations, where the violation is based on defective notice, if the affected person had actual and timely notice of the item of business under consideration (Cal. Govt. Code § 54960.1(d)(5)).

Third, while the district attorney or any interested person may bring suit to void the policy body's action, the suit must be preceded by a "cure and correct" process that, if properly executed, will preclude the ability to sue. Cal. Govt. Code §§ 54960.1(a), (b). In brief, before filing suit, the person must serve a written demand letter on the policy body explaining the violation, to give the body a chance to correct it. Cal. Govt. Code § 54960.1(b). Tight time frames dictate when the demand letter must be submitted, when the policy body must correct the violation, and the deadline for filing suit if the body does not correct the violation. Cal. Govt. Code § 54960.1(c).

If the cure and correct process fails, suit is timely filed, and a court finds that the policy body violated one of the Brown Act sections enumerated above, the court may set aside the action (except as noted above), and award the plaintiff court costs and attorneys' fees. Cal. Govt. Code §§ 54960.1, 54960.5.

3. Injunctive and declaratory relief

Courts may issue an injunction or declaratory relief to stop or prevent violations or threatened violations of the Brown Act or to determine the applicability of the Brown Act to ongoing actions or future threatened actions of a policy body. Cal. Govt. Code § 54960(a). The district attorney or any interested person may seek such relief. In addition, suit may be brought to determine the applicability of the Brown Act to past actions of a policy body. Cal. Govt. Code §§ 54960(a), 54960.2. This latter type of suit may be brought only after the policy body has been given an opportunity to make an unconditional commitment to desist from acting in the future in the same allegedly unlawful way it has acted in the past. Cal. Govt. Code § 54960.2.

The court may award court costs and attorneys' fees to a successful plaintiff. Cal. Govt. Code §§ 54960, 54960.2, 54960.5.

4. Sanctions for disclosing confidential closed session information

The Brown Act provides certain remedies and penalties for disclosing, without the policy body's authorization, confidential information acquired in a closed session. Cal. Govt. Code § 54963. They include injunctive relief to prevent the disclosure of such information, disciplinary action, and referral to the grand jury. Cal. Govt. Code § 54963(c). But certain disclosures of such information are lawful, such as when complaining to a district attorney or grand jury about Brown Act violations that occurred in closed session. Cal. Govt. Code § 54963(e).

B. Violations of the Public Records Act

Under the Public Records Act, a person may sue to enforce the right to inspect or receive a copy of a record. Cal. Govt. Code §§ 6258, 6259(a). If the court finds that the decision to refuse disclosure was not justified, it will order the record disclosed. Cal. Govt. Code § 6259(b). The court awards court costs and attorneys' fees if the plaintiff prevails. Cal. Govt. Code § 6259(d). These sums can mount up quickly. Thus, compliance with the Public Records Act is imperative not merely to serve the laudable ends of open government, but also to preserve the public fisc. On occasion, local governments have been required to pay substantial attorneys' fee awards, in the hundreds of thousands of dollars, in public records cases where the court has ruled for the plaintiff.

If the court finds that the plaintiff's Public Records Act claim is clearly frivolous, it awards court costs and attorneys' fees to the public agency. Cal. Govt. Code § 6259(d). But few plaintiffs' claims meet the "clearly frivolous" standard. The costs and attorneys' fees incurred by public agencies in defense of claims that are unsuccessful but not clearly frivolous can be substantial and generally must be borne by the agency.

C. Remedies and penalties under the Sunshine Ordinance

1. Willful violation is official misconduct

Willful failure of any elected official, department head, or other managerial City employee to discharge any duties imposed by the Sunshine Ordinance, Brown Act, or Public Records Act is official misconduct. Admin. Code § 67.34. The Sunshine Ordinance authorizes the Ethics Commission to hear complaints involving willful violations of these laws by elected officials or department heads. Admin. Code § 67.34.

2. Administrative appeal of public records denials

The Sunshine Ordinance provides three administrative appeals processes for a requester to challenge a department's denial of access to records. If the department refuses, fails to comply, or incompletely complies with a public records request, the requester may petition (1) the Sunshine Ordinance Task Force, (2) the Supervisor of Records (City Attorney's Office), or (3) in certain cases, the Ethics Commission, for a determination whether the requested record should be disclosed. If the Task Force or Supervisor of Records decide that denial was improper and the department then does not produce the record, the Task Force and Supervisor of Records may refer the matter to an enforcing agency. Admin. Code §§ 67.21(d), (e); 67.30(c).

When a person has initiated a Task Force proceeding to challenge a department's refusal to produce a record, and the Task Force has found a violation, the Task Force sometimes will refer the case to the Ethics Commission. The Ethics Commission may also consider some disputes concerning an alleged denial of access to records, even if the Task Force has not yet heard the matter. For matters before the Ethics Commission, different burdens of proof or procedures may apply if either the Task Force has already considered the matter, the person challenging the denial is asserting that City staff willfully refused to produce the disputed records, or the person who allegedly violated the Sunshine Ordinance is an elected official or department head. For further details concerning the Ethics Commission's processes for Sunshine Ordinance matters, see the Ethics Commission's Regulations for Violations of the Sunshine Ordinance, available on the Commission's website.

3. Administrative appeal of open meeting violations

The Sunshine Ordinance does not specifically prescribe a hearing process for alleged open meeting law violations as it does for public records denials. But, under its general authority to inquire into departmental compliance with the Brown Act and Sunshine Ordinance and report violations of those laws, the Sunshine Ordinance Task Force may hear and rule on complaints alleging a violation of the open meeting laws. Admin. Code § 67.30(c). Or the Task Force may choose to evaluate the City's compliance with open meetings laws in some other manner. The Supervisor of Records generally does not rule on such matters.

4. Court enforcement of the ordinance

The Sunshine Ordinance authorizes any person to institute court proceedings to enforce the Ordinance. Any individual may sue to enforce the right to inspect or receive a copy of any public record, to enforce the right to attend any meeting required to be open, or to compel such meeting to be open. Admin. Code § 67.35(a). If an administrative complaint or referral is filed with a responsible City or state official who then does not take action within 40 days, the suit may be filed. Admin. Code § 67.35(d). A prevailing plaintiff is entitled to have the City pay its costs and attorneys' fees. Admin. Code § 67.35(b).

VII. Other city requirements for hearings and notice

A. Charter section 16.112: required notice and hearings for certain city actions

The Charter sets forth requirements, beyond those imposed by the Brown Act and Sunshine Ordinance or other federal, state, and local laws, for providing notice and public hearings before the City takes certain actions. Charter § 16.112. This provision requires the City to hold public hearings before taking the following actions:

- Closing, eliminating, or significantly reducing the level of services at any facility used by the public.
- Significantly changing the operating schedule or route of a transit line.
- Instituting or changing any fee, rates or fares affecting the public.
- Adopting any amendment to the General Plan or change in zoning or land use.

The City must publish notice of these public hearings in the City's official newspaper. But, upon the City's adoption of an ordinance specifying other means of publishing notice, the department must comply with the ordinance to satisfy the publishing requirement. Charter Art. XVII (definition of "published"). Questions concerning publishing of the required notice may be directed to the City Attorney's Office.

A significant reduction or change in services or operating schedules or routes does not include the occasional or temporary closure to perform regular maintenance or unforeseen, necessary repairs. For example, section 16.112 would not require a public hearing regarding closure of a transit line or a recreation center for a day in order to trim a tree next to the transit line or recreation center.

Section 16.112 does not indicate who must conduct the required hearing. The responsibility for compliance with the hearing requirement rests in the City official or body with authority to make the underlying decision. That official or body may assign a deputy or subordinate to notice and conduct the hearing.

Neither the Brown Act nor the Sunshine Ordinance applies to these hearings, unless the hearing is conducted by a policy body whose meetings are already subject to those laws. But we strongly recommend that, in addition to the required notice for a hearing under section 16.112, the official or body responsible for the hearing notice and conduct the hearing as if it were subject to the Brown Act and Sunshine Ordinance.

In addition, for the following matters, Section 16.112 requires the City to publish notice in the same manner as required for the matters discussed above:

- Any sale, lease, rental, encumbrance, or exchange of real property held by the City.
- The formation of special assessment districts and the conduct of hearings on protests of special assessment districts.
- The issuance of requests for bids or proposals involving expenditures of \$50,000 or more and the award of contracts for the same.
- Polling places and precinct officers for any election.

But, for these matters, section 16.112 does not require a public hearing.

B. The Citizens' Right-To-Know Act of 1998: pre-approval notice for certain city projects

The Citizens' Right-To-Know Act requires the City to post a public notice 15 days before approving certain types of City projects. Admin. Code §§ 79.1-79.8. We describe below the main features of this Ordinance.

1. Scope of ordinance

The Ordinance defines a "City project" as a project that includes all these elements:

- It involves new construction, a change in use, or a significant expansion of an existing use at a specific location. The Zoning Administrator interprets the terms "change in use" and "significant expansion of an existing use." Admin. Code § 79.2(d).
- It houses City operations at, or provides services or assistance from, the specific location.
- It is undertaken directly by the City or a contractor or other agent that receives \$50,000 or more in City funding for the construction and related work associated with the project and/or operating expenses for the project at the specific location. City funding includes funding from federal, state, or other sources that is administered by the City. Admin. Code § 79.2(c).

Admin. Code § 79.2(b)(i). "City project" includes but is not limited to administrative offices, housing and other residential projects, and programs that provide services or assistance to benefit the public from a fixed location. Admin. Code § 79.2(b)(ii).

The following projects are exempt from the Ordinance: (1) shelters for battered persons; (2) certain family care, foster, or group homes serving six or fewer persons; (3) projects undertaken solely to achieve compliance with disabled access requirements of federal or State law; (4) projects in the public right-of-way; and (5) projects outside the City limits. Admin. Code § 79.3.

2. Timing of required notice

The City officer, department, board, or commission that is sponsoring the City project must give the public at least 15 days' notice before "approval" of the project. Admin. Code § 79.1. "Approval" means an action by the sponsor making a final commitment to fund or undertake the project. Admin. Code § 79.2(a). It does not include a decision to undertake a preliminary study of one or more potential sites for a project. Admin. Code § 79.2(a). Rather, "approval" occurs when the sponsoring department makes a firm commitment to move forward with or fund a project at a specific location.

The point at which "approval" occurs differs from department to department. For example, where a commission governs the department, approval may occur when the commission approves funding for a project or approves the acquisition of land for a project. Where a department head has authority to approve projects without action by a commission, approval may occur when the department head enters into an architectural services contract, signs loan documents, or awards a grant.

3. Nature of required notice

The required notice must be posted at least 15 days before the approval of the project, and must remain posted through the actual approval or disapproval. Admin. Code § 79.5(a). A sign must be posted on the property. Admin. Code § 79.5(a). The sign must be entitled "Notice of Intent to Approve a City Project at this Location," and must identify the officer, department, board, or commission that will consider approval of the project, the date of consideration, and how to obtain more information. Admin. Code § 79.5(c). The Ordinance describes the requirements governing location, size, and similar details regarding the sign. Admin. Code § 79.5(b). The Director of Administrative Services has developed a standardized sign that departments may use to satisfy these requirements. Admin. Code § 79.5(d).

Instead of signposting, the sponsor of the City project may send mailed notice to property owners and, to the extent practicable, occupants in a 300-foot radius of the lot line of the property at least 20 days before consideration of the project approval. Admin. Code § 79.6. Such notice should also be sent to neighborhood organizations listed with the Planning Department where the site would be within the indicated geographic area of interest of the organization. Admin. Code § 79.6.

C. Sunshine Ordinance: notice to residents of city activities affecting their property or neighborhood

The Sunshine Ordinance sets special requirements for certain types of public notices departments, boards, agencies, or commissions issue to City residents in a specific area about matters that may impact their property or neighborhood. Admin. Code § 67.7-1. This provision does not in itself mandate that the City post a notice of a meeting or hearing. Rather, it comes into operation only when there is a separate requirement imposed by City or State law for notice of the meeting or hearing.

Where there is a requirement to mail, post, or publish to residents in a specific area a notice of a matter that may impact their property or that area, the notice should inform residents of:

- The proposal or planned activity. Admin. Code § 67.7-1(b).
- The length of time planned for the activity. Admin. Code § 67.7-1(b).
- The effect of the proposal or activity. Admin. Code § 67.7-1(b).
- A telephone contact for residents who have questions. Admin. Code § 67.7-1(b).
- If the notice informs the public of a public meeting or hearing, an explanation of how persons can submit written comments that will become part of the official public record. Admin. Code § 67.7-1(c).

The notice must be brief, concise, and written in plain, easily understood English. Admin. Code § 67.7-1(a).

VIII. The application of open government laws to private entities

Open government laws do not, as a general rule, apply to private entities. But in some circumstances the law considers the relationship between private entities and the City sufficiently close to impose disclosure and public access rules on private entities. Below we highlight these rules, which derive from provisions of the Brown Act, Public Records Act, and Sunshine Ordinance, as well as the Nonprofit Public Access Ordinance.

A. Disclosure of city's receipt of outside funding

No official, employee, or agent of the City may accept, allow to be collected, direct, or influence the spending of outside funding for the purpose of carrying out or assisting any City function, unless the City and the entity providing the funding make appropriate disclosures. Admin. Code § 67.29-6.

1. Triggering the disclosure requirements

For purposes of this provision, “outside funding” means more than money alone. It also includes goods or services that have a monetary value. If the funding exceeds in value \$100 in the aggregate, the disclosure requirements apply.

Outside funding means gifts that both nonprofit and for-profit entities make to the City for City functions. It does not include state or federal funds for City programs. But the City is required to disclose receipt of government funds under the Public Records Act.

A City function is any of the services, programs, events, or responsibilities the City ordinarily undertakes. Among other things, City functions can include providing City services, such as road or park maintenance, and sponsoring civic events, such as parades, conferences or festivals. Some of the factors that may be considered in determining if something is a City function are whether:

- The City traditionally performs the function.
- The City has an obligation to perform the function.
- The City pays for any part of the function.
- The City provides insurance for the function.
- The name of the function includes the City or a City official.
- City personnel oversee the function.
- City personnel attend or work at the function on City time.

2. The disclosure requirements

Disclosure of the outside funding must include the amount of the contribution, its source, and the names of all individuals or the organization contributing such money. Disclosure must also include any financial interest the contributor has involving the City. A financial interest includes a contract, grant, lease, or request for license, permit, or other entitlement for use.

In general, the department receiving or directing the funds must make such disclosure on its website. In addition, entities that provide or manage such funds must generally agree in writing to make these disclosures.

B. Disclosure of transactional records of entities that collect fees for city functions

Any contract, agreement, or permit between the City and an outside entity for performing a City-related program, function, or service that authorizes the entity to demand funds or fees from citizens must contain a provision requiring the entity to maintain accurate records of each transaction in a professional and businesslike manner. Further, such records must be

available to the public. If the entity does not comply with these requirements, the City may terminate the contract, agreement, or permit or impose a penalty equal to half of the fees derived under it during the period of noncompliance. Admin. Code § 67.29-7(c).

This disclosure requirement expressly applies but is not limited to agreements allowing an entity to:

- Tow or impound vehicles in the City.
- Collect a fee from persons in a pretrial diversion program.

For guidance as to other agreements for performance of a City program, function, or service that may be subject to this disclosure requirement, see the discussion of the “City function” concept in Section XII(A)(1), immediately above.

There is a strong likelihood that records subject to disclosure under this provision will contain personal information that must be redacted for reasons of privacy. To ensure that citizens’ privacy rights are protected, please consult the City Attorney’s Office before releasing records under this provision.

C. Disclosure of financial records of entities receiving city subsidies

The City may not give a subsidy in funds, tax abatements, land, or services to any private entity unless the entity agrees in writing to disclose certain financial records to the City. Admin. Code § 67.32. Subsidies in the form of grants, tax incremental financing, and below market leases are subject to this provision. The entity must provide the City with financial projections (including profit and loss figures) for the project for which the subsidy is provided, as well as annual audited financial statements for the project. These requirements apply only to the project for which the City provides the subsidy, not to the entity’s entire operations. All such projections and financial statements are public records that must be disclosed.

D. Access to meetings and records of nonprofit entities receiving city funding

The Nonprofit Public Access Ordinance imposes public access requirements on certain nonprofit entities that receive funding under a contract with the City. See Admin. Code §§ 12L.1-12L.10. We describe below the main features of the Ordinance.

1. Scope of ordinance

The Ordinance applies to nonprofit entities that receive at least \$250,000 per year in funding provided by or through the City and have at least one contract with the City. Admin. Code § 12L.3(e). In this context, “contract” means any agreement under which a nonprofit entity receives City-provided or City-controlled funds for its operations or programs or for

goods or services it provides to the public. Admin. Code § 12L.3(c). Agreements to provide the City with goods used by City government itself (such as office supplies) or to provide services or benefits to City employees or their dependents, are not “contracts” under the Ordinance. Admin. Code § 12L.3(c). But money the City receives under such agreements will count toward the \$250,000 annual threshold, so long as the entity has another agreement with the City that is a contract under the Ordinance.

2. Open board meetings

Each covered entity must allow the public to attend at least two typical meetings per year of its board of directors. Admin. Code § 12L.4(a)(1). Members of the public who attend must be allowed to address the board on subjects of public interest relating to the entity’s operations or services. Admin. Code § 12L.4(c)(1). At each such designated public board meeting, the board may adopt reasonable regulations to ensure that the intent of the Ordinance regarding public comment is carried out, provided that at least 30 minutes of public comment is permitted at the meeting. Admin. Code § 12L.4(c)(2).

At least 30 days before each such designated public board meeting, the entity must send written notice of the meeting’s date, time, and location to the Clerk of the Board of Supervisors for posting, and to the City Library for posting. Admin. Code §§ 12L.4(d)(1), (2). Upon request, the entity must inform any member of the public of the next designated public meeting’s date, time, and location. Admin. Code § 12L.4(d)(2).

The Ordinance does not require entities to alter the location or facility in which their boards of directors meet. Further, entities may preclude the public from attending those portions of a designated public board meeting that concern specified subjects (generally where public attendance would result in the violation of client or donor confidentiality, violation of the attorney-client privilege, or disclosure of a trade secret; or when the board will be discussing litigation, real estate acquisitions, or employee hiring or performance). Admin. Code § 12L.4(b). Finally, entities engaged primarily in abortion counseling or abortion services, domestic violence sheltering, or suicide prevention are not required to open their board meetings to the public. Admin. Code § 12L.4(a)(3).

3. Public access to financial records

Each covered entity must make available for public inspection and copying:

- Its most recent budget, as provided to the City in a grant or contract application.
- Its most recent tax returns, except to the extent privileged by law.
- Any financial audits or performance evaluations of the entity done within the last two years by or for the City, so long as the City has not designated them as confidential.

Admin. Code § 12L.5(a). The entity is not required to make other records available to the public. Admin. Code § 12L.5(a). Further, no record need be disclosed if doing so would reveal the identity of donors, or the amount or nature of any donation. Admin. Code § 12L.5(c).

The public may inspect these records during the entity's regular business hours, or receive copies, upon 10 days' notice. Admin. Code § 12L.5(a). The entity may charge the direct copying and mailing costs for records. Admin. Code § 12L.5(a). Each entity is responsible for costs incurred in complying with these and other requirements of the Ordinance other than direct copying or mailing costs, up to \$500 per year. Admin. Code §§ 12L.1(b); 12L.3(d). If there is a question whether an entity that has expended \$500 in costs in a year must continue to comply with the Ordinance, we recommend that the department consult the City Attorney's Office.

Entities engaged primarily in abortion counseling and services, domestic violence sheltering services, or suicide prevention counseling services, may fully comply with these disclosure requirements by providing copies of records through the mail. Admin. Code § 12L.5(a).

4. Community representation on the board

As City policy, the Ordinance calls for covered entities to make good-faith efforts to promote the membership, on its board of directors, of at least one member of the community who receives goods or services from the entity, or like goods or services from another nonprofit entity. Admin. Code § 12L.6(a). To encourage such community participation, covered entities must give public notice of board vacancies; allow members of the public to propose themselves or others for board membership; and allow the public to comment on board membership issues during at least one designated public board meeting per year. Admin. Code § 12L.6(b).

5. Enforcement of the ordinance

Complaints from the public concerning an entity's noncompliance with these requirements, or requests from the public for additional financial information which the entity is not required to disclose, are handled by a three-stage non-binding dispute resolution process, consisting of:

- The contracting City department's review of the complaint and recommended resolution.
- The Sunshine Ordinance Task Force's optional advisory review.
- The Board of Supervisors' review and recommended resolution.

Admin. Code § 12L.5(b). If an entity materially breaches its obligations under the Ordinance, the contracting City department is authorized, but not required, to terminate or decline to renew the organization's contract, partially or in its entirety. Admin. Code § 12L.7.

E. Application of passive meeting body rules to certain private entities

In limited circumstances, the Sunshine Ordinance's passive meeting body rules, discussed at Section IV(I)(2) above, apply to some meetings of some private entities.

First, private entities consisting of multimember bodies primarily formed or existing to serve as a non-governmental adviser to a member of a policy body, the Mayor, the City Administrator, a department head, or any elective officer are subject to the passive meeting body rules. Admin. Code § 67.4(a)(5). Where a City official does not form such a body, generally only its meetings with City officials will be subject to the passive meeting body rules. But the Sunshine Ordinance and other provisions of City, State, and federal law recognize privacy rights of individuals and entities. As a result, there may be instances where the Ordinance should not be interpreted to require public access to such meetings. Public officials with questions concerning their obligations arising out of attending such meetings should consult the City Attorney's Office in advance, if possible.

Second, if a private entity organizes a social, recreational, or ceremonial occasion for a policy body to which a majority of the body has been invited, the gathering is subject to the passive meeting body rules. Admin. Code § 67.3(c)(3). The entity is not required to provide notice of the event to the public, but the policy body should provide notice on the City's website if possible. Admin. Code § 67.4(a)(1). Upon inquiry to the entity by a member of the public, the entity must disclose the time, place and nature of the event. Admin. Code § 67.4(a)(1).

Third, if a private entity owns, operates, or manages property in which the City has or will have an ownership interest, including a mortgage, and on which the entity performs a governmental function related to furthering health, safety, or welfare, that portion of any meeting of the entity's governing board relating to the property, the government-related activities on the property, or performance under the City contract or grant, must comply with the passive meeting body rules. Admin. Code § 67.4(b). The City's agreement with the entity must require compliance in these circumstances with the passive meeting body rules. Admin. Code § 67.4(b). Upon request, the entity must disclose the time, place, and nature of the meeting and event, and any agenda prepared. The entity must make available to the public its records regarding the property, the government-related activities on the property, performance under the City contract or grant, and the portion of the meeting pertaining to these matters. Admin. Code § 67.4(b).

F. Application of the Brown Act and Public Records Act to certain private entities

In two narrow circumstances, the Brown Act and Public Records Act apply to a board of directors of a private entity:

- Where the entity is created by the Board of Supervisors to exercise authority that the Board may lawfully delegate to a private corporation or entity.
- Where the entity receives City funds and the membership of the board of directors includes a member of a City policy body appointed to the board as a full voting member by the policy body.

In these circumstances, the entity's board must conduct its meetings in conformance with the Brown Act. Cal. Govt. Code § 54952(c). And the records maintained by such an entity are considered public records, just like City records. Cal. Govt. Code § 6252(a).

References

To review the California Constitution and California statutes, visit:

<http://leginfo.legislature.ca.gov/faces/codes.xhtml>

State statutes cited in the Good Government Guide include the following, among others:

- Government Code § 1090 et seq.
- California Political Reform Act, Government Code § 87100 et seq.
- California Public Records Act, Government Code § 6250 et seq.
- The Ralph M. Brown Act, Government Code § 54950 et seq.

To review local San Francisco laws and ordinances, visit:

<http://www.amlegal.com/library/ca/sfrancisco.shtml>

Local ordinances and laws cited in the Good Government Guide include the following, among others:

- San Francisco Administrative Code § 8.1 et seq. (Records Retention & Destruction)
- San Francisco Administrative Code § 8.15 et seq. (Rules, Regulations & Reports)
- San Francisco Administrative Code Chapter 12L (Non-Profits)
- San Francisco Administrative Code Chapter 12M (Protection of Private Information)
- San Francisco Administrative Code Chapter 67 (Sunshine Ordinance)
- San Francisco Administrative Code Chapter 79 (Citizen's Right to Know Act of 1998)
- San Francisco Charter
- San Francisco Campaign & Governmental Conduct Code

To review California Fair Political Practices Commission Regulations, visit its website at:

<http://www.fppc.ca.gov/>.

To review San Francisco Ethics Commission Regulations and access Ethics Commission Forms, visit its website at: <http://www.sfethics.org/>.

Appendix

I. Board of Supervisors resolution on attendance for members of boards and commissions

FILE NO. 061175, RESOLUTION NO. 502-06

[Urging boards and commissions to adopt policies regarding members' attendance at meetings.]

Resolution urging each City board, commission, or advisory body to adopt an internal policy regarding members' attendance at meetings of the body, and requesting each body to submit a copy of its policy to the Board of Supervisors by December 1, 2006.

WHEREAS, City boards, commissions, and advisory bodies are created as multi-member bodies to make use of the talents, efforts, and perspectives of all of their members; and,

WHEREAS, The appointing authorities for such bodies strive in selecting members to promote both diversity and balance, in order to enhance both the breadth of community representation and the quality of decision-making in the conduct of the City's business; and,

WHEREAS, Excessive absenteeism by individual members of such bodies detracts from the achievement of those goals and potentially skews the decision-making process, deprives different communities of effective representation, and places an unfair burden on those members who are conscientious about attending meetings; now, therefore, be it

RESOLVED, That the Board of Supervisors urges that every appointive board, commission, or advisory body of any kind established by the Charter or by legislative act of the Board of Supervisors adopt an internal policy regarding members' attendance at meetings of the body; and, be it

FURTHER RESOLVED, That the Board urges that such policy address how and when members are to be excused from attending particular meetings, and when the body is to report a member's excessive absenteeism to the appointing authority; and, be it

FURTHER RESOLVED, That the Board requests that every appointive board, commission, or advisory body of any kind established by the Charter or by legislative act of the Board of Supervisors submit a copy of its internal policy regarding members' attendance to the Board no later than December 1, 2006.

(Adopted August 15, 2006)

II. Mayor's policy on commissioner attendance

Office of the Mayor Gavin Newsom, City & County of San Francisco
September 18, 2006

Departmental Directors and Commission Secretaries:

In a continuing effort to increase governmental efficiency and performance, I want to ensure consistent attendance of appointed representatives to our City and County commissions. I believe that consistent commissioner attendance is necessary for each commission to function well and effectively advance departmental goals. Appointments to commissions have been made by my office in order to allow for diverse viewpoints to be represented, so each commissioner's participation is essential.

Along those lines, my office is interested in establishing baseline standards of commissioner attendance across all city commissions:

- All commissioner absences be 'excused absences,' in which a commission secretary or the appropriate departmental representative is notified in advance of the meeting about the absence.
- A working goal of 100% attendance for commissioners, which recognizes the critical importance of each commissioner's attendance at meetings. As a practical matter, I believe it is appropriate to ask that each commissioner have at least 90% attendance to their regular commission's meetings—recognizing that illnesses or family emergencies arise very occasionally.
- In order to monitor efforts toward this goal, I ask that commission secretaries submit an annual report to my office at the end of each fiscal year detailing commission attendance.
- Moreover, I ask commission secretaries contact my commission's liaison if a commissioner misses a meeting without contacting the department in advance, or when a commissioner has missed three meetings in a fiscal year, so that my office may contact that commissioner.

Please consider incorporating these standards into your commission's policies and procedures as appropriate.

Each individual commissioner's experiences and skills are highly valued, and consistent attendance allows for the full potential of each commission to be utilized. Meeting attendance is also one of the many factors my office uses to consider future appointments of individuals currently serving on commissions, so detailed attendance records will be helpful to our appointment process.

Should you have any questions about this letter, please contact Wade Crowfoot at 554-6640.

Yours sincerely,

Gavin Newsom

III. Mayor's policy on discriminatory or harassing remarks made at public meetings

[Full Official Title: Mayor's Policy on Discriminatory or Harassing Remarks Made at Public Meetings of City Boards and Commissions.]

1. CITY POLICY AND GOVERNING LAW PROHIBIT DISCRIMINATION AGAINST OR HARASSMENT OF CITY EMPLOYEES.

The City invites public comment about its operations, including comment about the performance of its public officials and employees, at the public meetings of City boards and commissions. But City policies, along with federal, state and local laws, prohibit discrimination against or harassment of City employees based on race, sex and the other categories listed below. Discriminatory or harassing comments about or in the presence of City employees, even comments by third parties, may create a hostile work environment, if severe or pervasive.

City policy prohibits discrimination or harassment of its employees on the basis of:

Race, color, ancestry, national origin, ethnicity, place of birth, sex, age, religion, creed, disability or medical condition, HIV/AIDS status, sexual orientation, marital or domestic partner status, gender identity, parental status, pregnancy, weight or height or any other characteristic protected by state or federal employment discrimination laws or by the San Francisco Charter or local ordinance.

The City Attorney's Office is available to assist Boards and Commissions in identifying prohibited discrimination or harassment.

In order to acknowledge the public's right to comment on City operations at public meetings, while taking reasonable steps to protect City employees from discrimination and harassment, City Boards and Commissions shall adhere to the following procedures.

2. HOW TO RESPOND TO DISCRIMINATORY OR HARASSING REMARKS MADE AT A PUBLIC MEETING.

If any person makes discriminatory or harassing remarks at a public meeting that violate the above City policy, the chair of the meeting shall immediately take the following actions:

- a. The chair shall read the City's policy against discrimination and harassment, set forth above in bold type, into the record. The chair shall state that comments in violation of City policy will not be condoned and will play no role in City decisions.
- b. The chair shall further state that any City employee in the room who is offended by the discriminatory or harassing remarks is excused from attendance at the meeting, and that no City employee is compelled to remain in attendance where it appears likely that speakers will make further discriminatory or harassing comments.
- c. If that person or others continue to make discriminatory or harassing remarks that violate City policy, the chair shall remind the speaker of City policy, and then may

recess the meeting temporarily. After this temporary interruption, speakers engaged in public comment shall be permitted to finish their allotted time.

3. HOW TO RESPOND TO WILLFUL DISRUPTION OF THE ORDERLY CONDUCT OF A MEETING.

If persons engage in misconduct that disrupts the orderly conduct of the meeting, the chair shall follow the standards and procedures set forth in the state Brown Act (Cal. Gov. Code Section 54957.9) to deal with disruption of meetings. The Brown Act provides:

- a. If the “meeting is willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible,” the chair may ask for the assistance of the Sheriff’s Department in removing the persons engaged in the willful interruption.
- b. If “order cannot be restored by the removal of persons who are willfully disrupting the meeting,” the public body, by motion and majority vote, may order the meeting room cleared and continue the meeting in conformity with the Brown Act (representatives of news media, except those participating in the disturbance, shall be allowed to attend, and the public body may establish a procedure for readmitting individuals not responsible for willfully disturbing the orderly conduct of the meeting).

4. QUESTIONS.

Questions about this policy shall be directed to the Deputy City Attorney assigned to advise the Board or Commission.

(Adopted in 2005)

Public records request form

Name _____
Date _____
Address _____
City _____
Telephone _____
Fax _____

Information Requested:

(Please provide a reasonable description of the record(s). Please be as specific as possible.)

- ☐ I want to see the file.
- ☐ I want copies of certain pages in the file(s) that I have marked.
- ☐ I want the entire file copied.
- ☐ I will pick up the information on _____
- ☐ I want the information mailed to the address above.
- ☐ If less than 10 pages, please fax the information to the number shown above.

The cost for copies is 10 cents per page plus postage, except for mass-produced documents. Checks should be made payable to: "City and County of San Francisco."

FOR OFFICE USE ONLY:

Name: _____

Date: _____

By Name: _____

Good Government Guide

An Overview of the Laws Governing
the Conduct of Public Officials

Pages 1-122 last updated: February 2019
Pages 122-193 last updated: September 2014



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